The legal and social management of psychopaths

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Maya Mei-Tal: The Legal and Social Management of Psychopaths

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Abstract

Psychopathy has been a cause for disquiet for many years and has received more attention in recent years. Questions regarding its validity as a mental disorder, its effects on moral agency and the management of individuals suffering from the disorder have been hard to answer. This thesis first seeks to define psychopathy and establish its status as a valid mental disorder. If psychopathy is a mental disorder, rather than a behavioural construct, it must give rise to certain questions of management. Various claims concerning the responsibility and moral agency of psychopaths are considered, concluding that the psychological formation of psychopathy negates moral agency. The thesis then asks whether the disorder of psychopathy predicts recidivism, both general and violent, and whether such prediction is reliable. Evaluation of the evidence suggests that psychopathy is a valid and reliable risk factor. Management is therefore considered essential, whether civil or criminal. Mental health management of psychopaths in England and Wales is examined, discussing both current law and proposed reforms. It is found that psychopathy is currently an untreatable disorder, making civil management contentious. Criminal justice management in England and Wales is then examined, notwithstanding the claim of psychopathic irresponsibility. It is recommended that psychopaths be confined indefinitely, for the protection of the public, in conditions superior to those offered in most institutions. It is advocated that research into the treatment of psychopathy continues with the hope of establishing successful programs.

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Declaration

No part of this thesis has previously been submitted for the award of a degree in the University of Durham or any other university. The thesis is based solely upon the author's research.

Statement of Copyright

List of Abbreviations

AC	Law Reports: Appeal Cases
Acta Psychiat Scand	*Acta Psychiatrica Scandinavica*
Addict Behav	*Addictive Behaviours*
Adv Psychiatr Treat	*Advances in Psychiatric Treatment*
All ER	All England Law Reports
Am J Psychiat	*American Journal of Psychiatry*
Am Philos Quart	*American Philosophical Quarterly*
Am Psychol	*American Psychologist*
Ann NY Acad Sci	*Annals of the New York Academy of Sciences*
Arch Gen Psychiat	*Archives of General Psychiatry*
Aust NZ J Criminol	*Australian and New Zealand Journal of Criminology*
Aust Psychol	*Australian Psychologist*
B.M.L.R.	Butterworths Medico-Legal Reports
Behav Sci Law	*Behavioural Sciences and the Law*
Biol Psychiat	*Biological Psychiatry*
Brit J Criminology	*British Journal of Criminology*
Brit J Psychiat	*British Journal of Psychiatry*
Cal 3d	California Reports, 3rd Series
Calif L Rev	*California Law Review*
Can J Behav Sci	*Canadian Journal of Behavioural Sciences*
Can J Criminol	*Canadian Journal of Criminology*

Can J Psychiat	*Canadian Journal of Psychiatry*
Can Psychol	*Canadian Psychology*
Cl & Fin	Clark & Finnelly
CL & SC	*Crime, Law & Social Change*
Clin Psychol	*Clinical Psychology*
Clin Psychol Rev	*Clinical Psychology Review*
Clin Psychol-Sci Pr	*Clinical Psychology: Science and Practice*
Cognition Emotion	*Cognition and Emotion*
Cr. App. R.	Criminal Appeal Reports
Cr. App. R. (S.)	Criminal Appeal Reports (Sentencing)
Crim Beh Ment Health	*Criminal Behaviour and Mental Health*
Crim Justice Behav	*Criminal Justice and Behaviour*
Crim LR	*Criminal Law Review*
Crime & Just	*Crime and Justice*
Criminology	*Criminology: An Interdisciplinary Journal*
EHRR	European Human Rights Reports
Emory LJ	*Emory Law Journal*
Eur J Crime Cr L Cr J	*European Journal of Crime, Criminal Law and Criminal Justice*
Eur J Soc Psychol	*European Journal of Social Psychology*
EWCA Civ	Court of Appeal, Civil Division
EWCA Crim	Court of Appeal, Criminal

	Division
F.2d	Federal Reporter, 2nd Series
FC	Federal Court of Canada
Forum	*Forum on Corrections Research*
Harv L Rev	*Harvard Law Review*
Harv Ment Health Lett	*Harvard Mental Health Letter*
HRLR.	Human Rights Law Reports
Int J Applied Phil	*International Journal of Applied Philosophy*
Int J Forensic Ment Health	*International Journal of Forensic Mental Health*
Int J Law Psychiat	*International Journal of Law and Psychiatry*
Int J Offender Ther	*International Journal of Offender Therapy and Comparative Criminology*
Israel Law Rev	*Israel Law Review*
J Abnorm Child Psych	*Journal of Abnormal Child Psychology*
J Abnorm Psychol	*Journal of Abnormal Psychology*
J Am Acad Psychiat	*Journal of the American Academy of Psychiatry and the Law*
J Appl Psychol	*Journal of Applied Psychology*
J Consult Clin Psych	*Journal of Consulting and Clinical Psychology*
J Consult Clin Psych	*Journal of Consulting & Clinical*

	Psychology
J Contemp CJ	*Journal of Contemporary Criminal Justice*
J Contemp Legal	*Journal of Contemporary Legal Issues*
J Crim Just	*Journal of Criminal Justice*
J Forensic Psychiat	*Journal of Forensic Psychiatry*
J Interpers Violence	*Journal of Interpersonal Violence*
J Med Ethics	*Journal of Medical Ethics*
J Med Philos	*Journal of Medicine and Philosophy*
J Ment Health	*Journal of Mental Health*
J Pers	*Journal of Personality*
J Pers Soc Psychol	*Journal of Personality and Social Psychology*
J Psychiat Practice	*Journal of Psychiatric Practice*
JAMA	*Journal of the American Medical Association*
L & Hum Behav	*Law and Human Behaviour*
Law Psychol Rev	*Law and Psychology Review*
Legal Criminol Psych	*Legal and Criminological Psychology*
Lloyd's Rep Med	Lloyd's Reports: Medical
LQR	*Law Quarterly Review*
Med L Rev	*Medical Law Review*
NLJ	*New Law Journal*
NWU L Rev	*Northwestern University Law Review*
Pers Indiv Differ	*Personality and Individual Differences*

Phil Psychiat Psych	*Philosophy, Psychiatry, and Psychology*
Philos Quart	*Philosophical Quarterly*
Philos Rev	*Philosophical Review*
Prof Psychol: Res Pr	*Professional Psychology: Research and Practice*
Psych Bull	*Psychiatric Bulletin*
Psychiat Psychol Law	*Psychiatry, Psychology and Law*
Psychiat Quart	*Psychiatric Quarterly*
Psychiat Res	*Psychiatry Research*
Psychiat Serv	*Psychiatric Services*
Psychiat Times	*Psychiatric Times*
Psychol Assessment	*Psychological Assessment*
Psychol Bull	*Psychological Bulletin*
Psychol Crime Law	*Psychology, Crime & Law*
Psychol Med	*Psychological Medicine*
Psychol Public Pol L	*Psychology, Public Policy and Law*
Psychother: Theor Res	*Psychotherapy: Theory, Research and Practice*
Punishm Soc	*Punishment & Society*
Q.B.	Queen's Bench
Risk	*Risk: Health, Safety & Environment*
Rutgers L Rev	*Rutgers Law Review*
S Cal L Rev	*Southern California Law Review*
S.Ct.	U.S. Supreme Court Reports
Schizophrenia Bull	*Schizophrenia Bulletin*

Sex Abuse	*Sexual Abuse: Journal of Research and Treatment*
SLT	Scots Law Times
Soc Work Today	*Social Work Today*
Syracuse L Rev	*Syracuse Law Review*
U Penn Law Rev	*University of Pennsylvania Law Review*
UCLA L Rev	*UCLA Law Review*
WLR	Weekly Law Reports

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Sexual Offences Act 1956

Homicide Act 1957

Criminal Law Act 1967

Powers of Criminal Courts Act 1973

Mental Health (Amendment) Bill

Mental Health Act 1983

Mental Health (Scotland) Act 1984

Mental Health Order 1986

Criminal Justice Act 1991

Criminal Justice Act 1993

Crime (Sentences) Act 1997

Human Rights Act 1998

Crime and Disorder Act 1998

Mental Health (Public Safety and Appeals) (Scotland) Act 1999

Powers of Criminal Courts (Sentencing) Act 2000

Draft Mental Health Bill 2002

Criminal Justice Bill 2002

Sexual Offences Act 2003

Criminal Justice Act 2003

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INTRODUCTION

Psychopaths present a unique problem to society. By and large, whether in mental institutions or prisons, disruptive individuals are diverted away from society. The mad are civilly detained, the bad incarcerated. The choice of detention rests on whether the troublemaker is mad or bad. The answer to whether psychopaths are mad or bad is not easily discernible. Their mask of sanity[1] creates the appearance of badness, but their psychological formation suggests otherwise. Consequently, managing psychopaths is a challenge.

Psychopaths are so disruptive that allowing them to roam free in society is hardly desired. The two viable management alternatives, therefore, are criminal or civil confinement. This thesis explores the feasibility of these options in relation to psychopaths. The legal assumption of the criminal law is that psychopaths are responsible agents who deserve punishment. This assumption gives rise to two salient issues, namely responsibility and affect. As shown in the second chapter of this thesis, the inherent incapacities of psychopaths negate their moral agency. The criminal law is therefore incorrect in viewing psychopaths as responsible. One of the reasons for this misguided belief is the psychopathic improper display of affect.

Traditionally, our attitude towards those who do not show proper affect is negative. Whether in normal social situations or in antisocial situations, we judge harshly displays of improper affect. A detached attitude in an emotional situation is often offensive, as is a cheerful one in a distressing situation. Thus we are appalled at those who rejoice in the tragedy of others, or show no remorse at hurt they have caused themselves. The man who shows no grief at his

[1] Term borrowed from H. Cleckley *The Mask of Sanity* (5th Augusta Emily S Cleckley 1988)

mother's funeral, no remorse for a homicide he has committed, no emotion at his own trial, is distasteful to say the least. But our anger in these situations is not always justified.

Consider Meursault. An outsider, punished not for killing an Arab but for his improper affect. The crux of the prosecution case was Meursault's lack of remorse and soulnessness, not his lethal conduct.[2] At his mother's funeral, Meursault, slept, drank coffee, had a cigarette, chatted with the caretaker and did not cry once. He did not know how old his mother was. The day after, he went swimming and had a date with a girl he encountered at the beach. The death of his mother scarcely affected him. Later on, he takes a human life because of the scorching sun. At his trial, he did not exhibit remorse for his crime.

The norm is illustrated in *Crime and Punishment.* Dostoevsky's Raskolnikov appropriately responds to his crime with guilt-ridden torment. It is this internal suffering that makes him human, despite his crime. We can learn to live with him, because he is like us. The man who feels nothing is inhuman. The man who cannot feel is beyond the scope of our moral judgment.

Our focus is on the display of emotions. This focus is arguably misguided. To quote an atypical observer, "Remorse is a purely personal matter, not a circus performance."[3] Unmistakably the expression of remorse is significant for social interaction, but its origins are similarly valuable. We are wrong to judge the incapacity to feel proper emotions as identical to the choice not to feel proper emotions. They may appear comparable, but they are quite distinct. Arguably, we are not justified in resenting the man who is incapable of feeling proper affect. If Meursault was capable of grief, guilt and remorse but did not feel those because he did not care, he is a

[2] A. Camus *The Stranger* (Vintage International, Random House 1988), at 100-101.
[3] I. Brady *The Gates of Janus: Serial Killing and its Analysis* (Feral House 2001), at 44.

suitable object of resentment. However, if he was incapable of experiencing such emotions, we ought not resent him for it. The latter illustrates the psychopath, who does not wilfully disregard others' concerns. He is incapable of such regard. Therefore his detachment does not appropriately attract anger. Our anger is only justified if he was capable of empathy, guilt and remorse and chose not to follow their command.

Our attitudes toward psychopathic offenders have a real impact on governmental policies on crime and punishment. Our fear and resentment initiates an informal process through which public policies are produced. The government becomes aware of public attitudes through elections, pressure and lobby groups, polls and surveys, protests and strikes, the media, and other formal and informal approaches. The democratic process of election requires the government to respond to public opinion, one way or another. Consequently, penal policies are largely shaped by public opinion. The escalation of penal populism in recent years, and associated research supports this claim.[4] The wide-ranging penal populism is equally applicable to policies targeting psychopathic offenders. Indeed the increase in the number of 'dangerous offender' statutes in western countries suggests that fear, more than resentment, provokes changes in legislation.[5]

The dissertation presented here maintains that such emotional and reactive driven policies fail to manage adequately the problem presented by the psychopath. An intriguing paradox emerges. Emotions tend to cloud our judgement and often create an

[4] See J.V. Roberts *et al., Penal Populism and Public Opinion: Lessons from Five Countries* (OUP 2002); D. Garland *Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001); G. Cavender "Media and Crime Policy: A Reconsideration of David Garland's The Culture of Control" 6.3 *Punishm Soc* 335-348.

[5] See, for example, the public pressure in the UK to enact laws requiring the system to notifying communities of sex offenders living in their midst. BBC News "New Law Call After Boy's Murder" (30 October 2004); BBC News "Paper Defends Paedophile Campaign" (16 December 2001); BBC News "Sarah's Law 'Unworkable'" (13 December 2001).

intellectual thinness that appears to pervade our criminal justice and mental health policies. Our sentiment-based policies result in us objectifying the psychopath in a manner similar to the way the psychopath objectifies us. The psychopath exploits the people around him to satisfy his own immediate desires. We act comparably by detaining him to assuage our fear. We thus disregard his rights, wants, and needs, placing our interests above his. By confining the psychopath mainly for enhancing our sense of safety, we regard him as a means to our ends. The alternative is to emotionally disengage and develop policies that are evidence-based, rather than sentiment-based. We would thus compile our research, determine the most effective management course and implement it. By separating ourselves from our emotions, we adopt a rationalistic evidence-based approach that may uncover more effective and proactive management and treatment plans. The ensuing exposition explores existing management alternatives in the mental health and criminal justice fields, following an analysis of the disorder of psychopathy, its moral status, and its risks.

Thesis Structure

Chapter 1

The conception of psychopathy as a personality disorder is developed in the first chapter of this thesis, suggesting that psychopathy is a valid clinical disorder, not merely a social, or behavioural, construct. It is maintained that the disorder of psychopathy, following the Hare Psychopathy Checklist, satisfies philosophical, psychological, and psychiatric definitions of mental disorder. Psychopathy is composed of constituents essential to its diagnosis as a mental disorder. The psychopathic personality maladjustment can be disaffiliated from society's norms, and associated with the intrinsic personality traits. The psychopath is more than a rebel; he is an alien. His behaviour is not motivated by

dissent, but by an inability to grasp moral norms. The psychopath exhibits physiological, neurological and cognitive differences compared to the non-psychopath. Support for this assertion comes from considerable research in the fields of psychology and neuroscience.

The claim is made and supported by first discussing the development of the concept and label of psychopathy. The confusion that results partly explains the misunderstanding of psychopathy and the difference of opinion in relation to its status as a mental disorder. The investigations made by Robert Hare and his colleagues since the 1970s alleviate some of the confusion, at least in research circles, have produced a valid and less ambiguous characterisation of psychopathy. To demonstrate that psychopathy is indeed a mental disorder, one ought to first identify what the mental disorder construct signifies. The assorted views on the meaning of mental disorder lead us away from the social and behavioural understanding, towards a more internal conception of mental health and illness, to which psychopathy applies. The status of psychopathy as a mental disorder is then confirmed, and opposing arguments are challenged and refuted. The superiority of the Psychopathy Checklist to the DSM and the ICD is shown. The PCL-R is a diagnostic tool affording greater reliability and validity than other available diagnoses. The question whether psychopathy may be categorised as a non-arbitrary entity, a taxon, is then examined. Concluding that a continuum view of psychopathy is preferred does not negate its status as a mental disorder. Neither does the uncertain aetiology of the disorder undermine its mental disorder status. These discussions do, however, elucidate the concept of psychopathy, thereby assisting further discussion. Empathic ability, or the lack of, is regarded as an important element of the disorder of psychopathy that may have aetiological importance. It is also significant for a consideration of the moral agency of psychopaths, which follows.

Chapter 2

Are psychopaths moral agents? Focusing on individuals suffering from full-fledged psychopathy, the conclusion reached is negative. Moral agency, albeit generally assumed in adults, is founded on certain capacities which are fundamental for its development and maturity. Psychopaths lack some of those essential capacities and thus fail to reach moral agency. Moral agency should be a prerequisite for criminal culpability. When asking whether psychopaths should be held criminally culpable for their criminal behaviour, we assume moral agency. As per retributivism, the guilty deserve to be punished. Accordingly, the absence of moral agency in the psychopath prevents him from being guilty in any substantive sense. The retributivist would therefore agree that the psychopath could not be punished in the absence of culpability. Rule-utilitarians are likely to concur with the retributivist since the rule requiring culpability is beneficial. Thus, absent moral agency both rule-utilitarians and retributivists would object to punishing psychopaths, acceding to the significance of moral agency.

Furthermore, the law recognises that psychopaths are not full moral agents. Specifically, the defence of diminished responsibility recognises psychopathy as a partial defence to murder. The interpretation of the defence of diminished responsibility includes the disorder of psychopathy as a possible cause for weakened culpability. This legal recognition of psychopathy provides philosophical support to the view that psychopaths lack full moral agency, at least to an extent. Unfortunately, the defence fails to realise its implications, remaining a mere partial defence to murder. This limitation is merely a technical, rather than a principled drawback. The defence of diminished responsibility remains evidence that the law recognises psychopathy as a disorder limiting culpability due to absence of moral agency. The justificatory

insanity defence, in its current reading, fails to recognise psychopathy as a relevant disorder. However, construed differently, the knowledge requirement could convey an interpretation that is both deeper and truer to psychological knowledge, and insist on comprehension of right and wrong. As psychopaths lack this deeper sense of understanding of their conduct, such construction would acknowledge the absence of psychopathic moral agency.

Discussions of philosophical and psychological understanding of moral agency provide further persuasion to the view of psychopathy as a disorder affecting agency. Both philosophical and psychological conceptions of moral agency consider certain affective capacities to be requisites for moral agency. The psychopath does not have some of these affective capacities. Therefore, legal, philosophical and psychological theories corroborate the view that psychopaths lack moral agency and ought not to be considered moral agents. The law ought to acknowledge more fully the lack of moral agency of the psychopath and recognise the absence of a justification for holding psychopaths culpable and conferring punishment.

Chapter 3

Prior to discussing management alternatives for the psychopath, and bearing in mind psychopaths' lack of moral agency, one ought to assess the risk of recidivism that they pose. Notwithstanding the impossibility of achieving perfect predictions through risk assessment processes, sufficient certainty has been achieved to allow these practices to be valuable for management decisions. Contrasting dangerousness predictions with risk assessment, we come to the conclusion that the latter is preferable for its enhanced validity and reliability. The attempts at predicting dangerousness have been beset with problems. Acute variance in definitions of dangerousness has undermined the effort to predict dangerousness.

Prediction processes were also clinical in nature, rather than actuarial, and entailed serious reliability issues, due partly to the unstable definition and partly to its underpinning in clinical judgement. Actuarial predictions were soon proven to be valid and reliable instruments to assess future risk, rather than dangerousness. A number of key modern risk assessment tools, such as the Violence Risk Appraisal Guide (VRAG), the Level of Service Inventory-Revised (LSI-R), the HCR-20 (20 Historical, Clinical and Risk Management factors), and the PCL-R, are discussed to demonstrate their worth in calculating the future risk of psychopaths.

The VRAG, an actuarial risk assessment tool encompassing static risk factors, attaches importance to an individual's PCL-R score. Its reliability in assessing risk has extended beyond expectations and is considered a sound tool assessing violent recidivism. The LSI-R, even though less popular than the VRAG, was recently described the most useful actuarial measure available today. Unlike the VRAG, the LSI-R consists of dynamic risk factors, enhancing its value for management purposes. The HCR-20, regardless of broad applicability remains in its early developmental stages. An interdisciplinary risk assessment study, the MacArthur Risk Assessment Study, examined risk assessment practices in a population of civil psychiatric patients. It found that the PCL-R is a valid and reliable risk assessment construct in such populations. The impression surfacing from the examination of these risk assessment tools supports taking into account PCL psychopathy in assessing future risk. Indeed PCL-R psychopathy is associated with general and violent criminality and is valid across a variety of populations, cultures and ages.

Having established the predictive validity and reliability of PCL-R psychopathy, one ought to consider both primary and secondary prevention; primary prevention being the application of risk

assessment to anticipatory avoidance schemes, and secondary prevention, a more immediate prevention, such as preventative detention and selective incapacitation. Despite the value of primary prevention, a thorough examination of possibilities is beyond the scope of this dissertation. Thus, a brief discussion ensues, followed by two chapters dealing with secondary preventative measures employed by the mental health and criminal justice systems.

Chapter 4

The combination of psychopathy being a mental disorder deficient in moral agency indicates that the mental health system should provide the appropriate form of management. Exploring mental health management entails discussion of both the Mental Health Act 1983 and the Draft Mental Health Bill 2002 and their application to psychopathic individuals. Neither statute specifically refers to PCL psychopathy. The 1983 Act speaks of psychopathic disorder, which is significantly different from PCL psychopathy. The draft Bill removes the category of psychopathic disorder, establishing a definition of mental disorder without sub-types. The application of both measures to PCL psychopaths is considered. The 1983 Act requires that treatability be proven prior to the treatment of those suffering from a psychopathic disorder. The draft Bill again disposes of this requirement, in all probability due to the perceived difficulty concerning the treatability test. In relation to psychopaths, therapeutic pessimism has possibly caused more harm than the treatability test itself. The draft Bill, while abolishing the treatability test, introduced a new requirement of availability. This new stipulation makes the availability of appropriate treatment to the patient a condition for treatment. New treatment centres focusing on personality-disordered persons have been developed, so as to make treatment available. However, psychiatric cooperation is essential for the accomplishment of this aim. Without psychiatric accord, the draft Bill will remain an empty mechanism. The

legislative emphasis on public safety may not be appropriate to psychiatrists' view of their responsibilities.

Risk assessment is an issue for both the 1983 Act and the draft Bill. Unlike our previous discussion of risk assessment, mental health legislation does not de-emphasise risk to the health and safety of the patient. This is less relevant when managing the psychopath, and Parliament has given little guidance to the assessment of such risk. It is asserted that courts ought to consider actuarial risk assessment tools, specifically the PCL-R.

The draft Bill is arguably superior to the 1983 Act thanks to the improvement of services specifically tailored to personality-disordered individuals.

Chapter 5

Following the discussion on mental health management comes an examination of criminal justice management options. Notwithstanding the previous conclusion concerning the lack of moral agency of psychopaths, criminal justice management alternatives ought to be examined. Indeed the majority of psychopathic offenders at present are considered responsible agents and are thus subject to criminal sanctions. Prior to analysing the particular features of the various sentencing options, an understanding of the justification for dangerous offender legislation ought to be advanced. The retributive theory of progressive loss of mitigation is discussed, along with other justifications, emphasising public protection.

Criminal sentencing in the UK has also been subject to reform. Consequently, both old and new measures shall be analysed. Prior to 2003, psychopathic offenders could have been dealt with under one of four sentencing options, namely the discretionary life

sentence, the automatic life sentence, the longer than commensurate sentence, and the extended sentence. In 2003, Parliament enacted the Criminal Justice Act 2003 which embodied a comprehensive reform of the criminal justice system in general, and sentencing provisions in particular. The old provisions are analysed in an attempt to discern the flaws Parliament sought to remedy with the new legislation.

Among the four alternatives of the old law, the discretionary life sentence may have attracted the least amount of criticism. Its discretionary nature allowed judges to consider long-established principles of sentencing and apply them to offenders and offences that truly demanded such sentence. Thus, it embodied a certain suitable measure of discretion.

The automatic life sentence, on the other hand, was considered by some to be a disaster.[6] Not only did it unnecessarily limit judicial discretion, it also failed to improve public protection. It created a number of new problems that the courts sought to solve by widening the scope of the exception to the rule. Essentially, the legislature attempted to limit judicial discretion and failed. It created all kinds of new problems throughout its application, which it attempted to mend with the 2003 Act.

The longer than commensurate sentence was aimed at those violent or sexual offenders who posed risks of harm to the public but whose offences did not attract a life sentence. The restraint it placed on judicial discretion was slighter than the automatic life sentence, but it too failed to provide adequate protection to the public. Essentially it invited sentencing judges to assess the risk of harm posed by a defendant, in the absence of the necessary means

[6] See M. Wasik "Going Around in Circles? Reflections on Fifty Years of Change in Sentencing" *Crim LR* 253-265, at 258, referring to the Crime (Sentences) Act 1997.

for it. Parliament stressed the seriousness of potential harm, but took little notice of the risk of such harm occurring. It further failed to contend with the nature of the harm and whether it ought to be of similar nature to the index offence. Overall, the longer than commensurate sentence may have increased prison population, but failed to advance the protection of the public.

The fourth sentencing alternative, the extended sentence, represented an extended licence period for sexual and violent offenders, which increased public protection by subjecting these offenders to recall. Overall, it appeared as though sentencing alternatives inadequately managed the problem of repeat offending. Parliament sought to improve the situation with the 2003 Act. At this point, it is hard to predict the effect of the new legislation. Nevertheless, as long as it fails to utilise professional expertise, for example in relation to risk assessment, and fails to emphasise primary, or long-term, prevention, it is unlikely to improve public protection. The 2003 Act introduces a mandatory life sentence and a sentence specifically aimed at public protection. Both sentences emphasise risk assessment, relying heavily on previous convictions. Courts are not required to demand specialist knowledge on risk assessment, and thus again are likely to fail in the attempt at protecting the public. To improve differentiation between that small group of offenders who commit a disproportionate crime in the community and the rest of the offending population, courts ought to rely more heavily on actuarial risk assessment tools, particularly the PCL-R. Without such reliance, criminal justice management is bound to increase incarceration without affecting public safety.

Conclusion

This dissertation advances a relatively comprehensive examination of the management of psychopathic offenders in England today.

The focus is on adult, male psychopaths. The examination, interdisciplinary by definition, touches a number of disciplines with beliefs and ideas much different from one another. The lawyer is liable to be practical and realistic, whereas the philosopher gravitates towards the theoretical and intellectual. Psychologists and psychiatrists are predisposed to emphasise the easing of human pain, albeit through different methods. Incorporating all these disciplines in one thesis is bound to prove problematic, not only in one's approach to each discipline and its assumptions, but in the truthful representation of such. The reader is therefore kindly invited to consider these differing perspectives in considering what follows.

CHAPTER ONE: THE DISORDER OF PSYCHOPATHY

1.1. Introduction

Psychopathy presents a significant though underestimated predicament to society. An exception to John Donne's assertion that no man is an island,[1] the psychopath is isolated and disconnected from society, much like an island.[2] The bonds that tie most individuals to each other, from the concrete ties of family and friends, to the abstract norms of society, are absent in psychopaths. Hence, the psychopath is impersonal, unreliable, unscrupulous, and deviant. Suffering from anaemia of the emotions, the psychopath lacks the capacity to bond with others. The result is a disruptive troublemaker answering to no higher authority than his or her own present inclinations.

Unlike the public perception of the psychopath as a serial killer, as exhibited in films the likes of 'Silence of the Lambs', the psychopath is like a Renaissance man of crime, trying his hand at everything. Impulsive and opportunistic, he stumbles across crimes as casually as we do food. Faced with diminishing funds, the psychopath will go out searching and will steal and kill with the same indifference as if he were searching his fridge for a snack.[3] Lacking the inhibition that impedes most from committing immoral or illegal acts, the psychopath regards everything and everyone as means to his own momentary ends.

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[1] See J. Donne "Devotions upon Emergent Occasions – Meditation XVII" in C.M. Coffin (ed) *The Complete Poetry and Selected Prose of John Donne* (Modern Library 1952), at 441.

[2] See P. Clyne "A Sort of Quiet Detachment" in P. Clyne (ed) *Guilty But Insane* (Nelson 1973), where he discusses psychopaths.

[3] See P. Arenella "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability" 39 *UCLA L Rev* 1511-1622, where the author discusses a typical example of a psychopath who, after losing money at a card game, he goes out to get more, robbing a petrol station and killing the attendant in order to avoid detection.

Disconcertingly, the percentage of psychopaths in the law-abiding population is higher than might be expected. A cautious estimate by an expert[4] claims there is a minimum of two million psychopaths in North America.[5] Others put the estimate at 1% of the general population.[6] Psychopathy is also prevalent across cultures, echelons and classes of society, from the poverty stricken to the rich and successful. It is found in different countries as well as different racial and ethnic groups. Psychopaths are found in Britain and North America, Sweden and Portugal, in African-Americans, Native-Americans, Anglo-Americans[7], and more. Thus the dilemma of the psychopath touches all cultures, presenting a worldwide criminological problem.

More importantly, psychopaths are more noticeably represented in prison and forensic populations, with estimates ranging between 15% and 40%, depending on the sample.[8] A recent study in a mental institution in Massachusetts found that the incidence of psychopathy was 25% in a sample of paedophiles and 40% in a rapist sample.[9] In a recent study made in Grendon Underwood therapeutic prison, it was found that the subsistence of psychopathy in the prison population was similar to that reported in North America.[10]

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[4] R.D. Hare.

[5] R.D. Hare *Without Conscience: The Disturbing World of the Psychopath Among Us* (Guilford Press 1993) The author also estimates that there are 100,000 psychopaths in New York City alone, at 2.

[6] R.D. Hare "The Hare PCL-R: Some Issues Concerning its Use and Misuse" 3 *Legal Criminol Psych* 99-119, at 104. See also R.A. Gonclaves "Psychopathy and Offender Types: Results from a Portuguese Prison Sample" 22 *Int J Offender Ther* 337-346

[7] R. Lynn "Racial and Ethnic Differences in Psychopathic Personality" 32 *Pers Indiv Differ* 273-316

[8] R. Serin "Can Criminal Psychopaths Be Identified?" 1.2 *Forum*, maintains a range of between 18% and 40% of offenders. Gonclaves "Psychopathy and Offender Types: Results from a Portuguese Prison Sample", maintain a range of 15% and 20% in prison populations.

[9] Cited by Serin "Can Criminal Psychopaths Be Identified?", by Dr. R. A. Prentky, Dr. R. A. Knight.

[10] L. Hobson and J. Shine "Measurement of Psychopathy in a UK Prison Population Referred for Long-Term Psychotherapy" 38.3 *Brit J Criminology* 504-515, 26% of the sample of 104 inmates in Grendon prison were classified as psychopaths. This is similar to the results from North American prison

Being generally disruptive, psychopaths also present a major prison management problem.[11] They tend to upset other patients in psychiatric institutions, as well as other inmates in prisons, by provoking and manipulating them. For instance, a psychologist in a Missouri maximum security mental institution was killed by a patient after the latter was incited by an alleged psychopath.[12] Furthermore, therapy group sessions are defeated through the typical antisocial behaviour of psychopaths. Thus, if an organised society is favoured, we ought to be concerned with the problems psychopathy presents and attempt to resolve the situation.

The nature of my lifestyle included a high degree of mystery[13]

1.2. A Valid Clinical Disorder or a Behavioural Construct?

A number of aspects relating to the phenomenon of psychopathy are disputed. A central question is whether the phenomenon is a valid clinical disorder of mind, or merely a behavioural construct. Historically, the psychopath was recognised by his antisocial and immoral behaviour, giving rise to the argument that the problem is one of a behavioural and social nature, rather than an internal one. Essentially, the survival of a society depends on the cooperation of its members, thereby creating the expectation that individuals conduct themselves in a manner consistent with the interests of the group. Hence, behaviour which defies the moral norms and legal

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population (Hare). However, it is quite higher than previous studies in the UK reported (Raine & Cooke), perhaps due to Grendon's requirements for the presence of a personality disorder as a prerequisite to admission.

[11] See Cleckley *The Mask of Sanity*, Part I of Section 2 where he discusses the manifestations of the disorder through patients. See also *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development* (1999)

[12] St. Louis Post-Dispach, September 21, 1971, at 3, col. 1, cited in J.B. Gerard "The Usefulness of the Medical Model to the Legal System" 3.9 *Rutgers L Rev* 377-423, at 411.

[13] A remark made by Fred Coe, a psychopathic serial rapist, cited in J. Olsen *Son – A Psychopath and His Victims* (Dell Publishing 1985), at 102. Fred Coe, April 15, 1982.

rules of a society, is deemed antisocial and undesirable. Society defines what is to be deemed unacceptable behaviour on the part of individual members, thereby attaching a moral stigma to the individual acting disobediently. Following this line of reasoning, psychopathy could be seen as merely a social construct, an antisocial construct, defined by the patterns of antisocial behaviour of the subject.

According to this 'social construct' view, the categorisation of psychopathy as a mental disorder is false, and we should not excuse or defend the behaviour of such individuals on the basis of psychopathy. To do so would be to excuse those whose behaviour is so antisocial we assume they must be abnormal. When behaviour is incomprehensible, the tendency is to view it as abnormal and therefore clearly disordered, somehow. For instance, when we hear of a murder without an apparent logical reason, we are so shocked we assume the person must be mentally disordered. The concern in relation to such assumptions is that the worse the behaviour, the more available the excuse of mental disorder would be.[14] Natural as it may be to regard atrocious behaviour as inhuman and therefore insane, this is not so.[15] Indeed excuses should not be made available automatically. Mental disorder ought not excuse from responsibility in isolation from other factors.[16] Behaviour is frequently the symptom from which all kinds of illnesses are inferred and diagnosed. Certainly to exclude liability solely due to a behavioural symptom would be circular and wrong. This is not the case with psychopaths, however, as psychopaths ought to be excused due to their underlying incapacities, not their behaviour. One ought to distinguish between those whose behaviour is immoral because they choose not to follow conventional morality and those who

[14] See B. Wootton "Diminished Responsibility: A Layman's View" 76 *LQR* 224, at 231.
[15] Not only does it not present itself as often in the animal kingdom, but it relies on choice which is essentially a human concept.
[16] See C. Elliott "Diagnosing Blame: Responsibility and the Psychopath" 17 *J. Med. Philos.* 199-214, at 201.

simply do not have the capacities requisite for moral agency. Consider the mobster as a persistent criminal who does not necessarily suffer from a mental disorder. The mobster is clearly loyal to his fellow mobsters and is a part of an intricate social organisation characteristic of his mafia family. He does not care for the moral norms of society as a whole, but certainly cares for the rules of his faction of it. An excuse is certainly inappropriate in this case, as there is no mental disorder, nor is there a mental disorder affecting responsibility. The psychopath, in contrast, does not have the capacity for such loyalty and adherence to a code of allegiance, and is hardly able to be loyal to himself. This is not a case of reckless disregard, but one of blindness.

Conversely, if the behaviour can be attributed to an internal underlying cause, it can be said to be more than merely social. An internal disorder, a disorder of the mind, if proven to be such through medical evidence, may be seen as excusatory and sometimes justificatory by the criminal law.[17] Hence it is vital to scrutinise the evidence and examine the nature of psychopathy. The meaning of mental illness and disorder shall therefore be discussed, followed by a discussion of the disorder of psychopathy itself. The following analysis shall demonstrate that psychopathy is indeed a valid clinical disorder of personality that is empirically supported. It is not a circular and behavioural construct based solely or mainly on persistent criminality. Psychopathy is represented by a cluster of personality traits and behavioural patterns that collectively establish the disorder.

Note that a significant lack of professional agreement as to the clinical status of psychopathy may compel the criminal justice system to treat these offenders as sane and punish them for their crimes. However, a certain level of clinical concurrence regarding

[17] The defences of insanity and diminished responsibility are illustrations.

the condition would necessitate an enquiry into the appropriate management for these individuals. It shall be argued that there is indeed such a sufficient level of clinical concurrence deserving of attention.

Before studying the disorder itself and the validity of its clinical description, the history of the use of the label of psychopathy, along with other similar ones shall be explored.

1.3. Historical Use of the Label

Psychopathy has been seen as a problem to justice systems and social order for many years. There have been many variations in the terms used to describe the disorder. Despite the abundance of labels, psychopathy has achieved sufficient clarity in clinical and forensic circles in recent years. The validity and reliability now benefiting the disorder of psychopathy justifies its utilisation in criminal justice and mental health circles.

Even before the term 'psychopathy' was coined in 1891[18], there were references to a disorder with similar characteristics using numerous labels, such as 'moral insanity', 'moral imbecility', 'moral deficiency', 'degenerate deficiency', 'congenital delinquency', 'sociopathy' and more.

The French physician and psychiatrist Philippe Pinel[19] was one of the first to acknowledge and describe the existence of personalities of a psychopathic nature. He depicted these individuals with the phrase *manie sans delire*,[20] symbolising their unimpaired cognitive capacities while recognising their apparently irrational behaviour. This was seen as a novel idea at the time, the concept of a man

[18] By the German clinician Koch.
[19] P.A. Pinel *Treatise on Insanity* (Hafner 1962)
[20] Insanity without delirium.

whose behaviour is clearly irrational but whose cognition was undamaged, as mental disorders were seen as necessarily those affecting cognitive faculties.[21] Thus the emphasis shifted to defects of emotions.

Benjamin Rush,[22] the American physician, directed his attention at the moral aspects of the phenomenon, thereby invariably connecting the disorder with its antisocial and immoral manifestations. The British physician and ethnologist Prichard[23] has been recognised as the first to establish a mental disorder referred to as "moral insanity".[24] Although these conceptions are far wider than modern models, the moral aspect has remained closely linked with the notion of a psychopathic personality.

The German clinician Koch[25] coined the term 'psychopathic inferiority' in 1891 to refer to all personality disorders. This term was chosen to signify Koch's belief that these disorders were innate, organic, deriving from a physical cause.

The German Emil Kraepelin[26] developed the concept further by dividing it into various sub-categories. By 1915, he established seven such sub-types, namely the excitable, unstable, impulsive, eccentric, liars and swindlers, antisocial, and quarrelsome.[27]

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[21] See T. Millon *et al.,* "Historical Conceptions of Psychopathy in the United States and Europe" in T. Millon, E. Simonsen, M. Birket-Smith and R.D. Davis (eds) *Psychopathy: Antisocial, Criminal, and Violent Behavior* (Guilford Press 2003) See also P. Tyrer *et al.,* "Personality Disorder in Perspective" 159 *Brit J Psychiat* 463-471

[22] See B. Rush "On the Influence of Physical Causes Upon the Moral Faculty" in B. Rush (ed) *Two Essays On The Mind* (Brunner/Mazel Publishers 1972)

[23] J.C. Prichard *A Treatise on Insanity and Other Disorders Affecting the Mind* (Gilbert & Piper 1835)

[24] In fact, several other theorists have discussed such conceptions previously, although without labelling it so unambiguously. See Millon *et al.,* "Historical Conceptions of Psychopathy in the United States and Europe"

[25] J.L.A. Koch *Kurzgefaßter Leitfaden der Psychiatrie* (2nd Ravensburg: Dom'schen Buchhandlung 1889)

[26] In successive editions of, E. Kraepelin *Psychiatrie: Ein Lebrbuch (Psychiatry: A Textbook)* (8th Barth 1915)

[27] See Millon *et al.,* "Historical Conceptions of Psychopathy in the United States and Europe"

Birnbaum[28] later suggested the term 'sociopathic' as more appropriate to those who were morally degenerate and criminally disposed. American psychiatrists later narrowed the term to apply to personality-disordered individuals exhibiting anti-social behaviour.

In the UK, The Mental Deficiency Act of 1913 introduced the 'moral imbecility',[29] based on Prichard's conceptions. It referred to those who, from an early age, displayed "some permanent mental defect coupled with strong vicious or criminal propensities on which punishment had little or no effect".[30] The Mental Health Act 1959 comprehensively amended the law[31] and introduced the term 'psychopathic disorder',[32] which withstood reviews and subsisted in the Mental Health Act, 1983. In the 1959 Act, 'psychopathic disorder' was defined as "a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment". The 1983 altered little in terms of substance[33] and moved the need for susceptibility to treatment from definitional to a prerequisite of treatment.[34]

This definition lacks specificity, as it discloses little regarding the disorder itself, while merely specifying the requirement of a causal link between disorder and aggressive behaviour. It does not specify

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[28] K. Birnbaum *Die Psychopathischen Verbrecher* (Thieme 1909) See Millon *et al.,* "Historical Conceptions of Psychopathy in the United States and Europe"
[29] As one of the four subdivisions of the definition of 'mental deficiency'.
[30] Section 1 of the Mental Deficiency Act, 1913.
[31] Partly due to the Percy Commission Report, HMSO *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 1954-7* (Cmnd. 169 1957) The proposed terminology included that of 'psychopathic personality'.
[32] For an historical discussion of the legal definitions in the UK, see N. Walker and S. McCabe *Crime and Insanity in England: Volume II: New Solutions and New Problems* (Edinburgh University Press 1973), especially chapters 4, 9, & 10, on the origins of the Mental Health Act 1959, moral insanity and psychopathy, and psychopathy in the 1960s, respectively.
[33] Exchanging 'whether or not including subnormality or intelligence' with 'whether or not including significant impairment of intelligence'.
[34] The 'treatability requirement'.

the level of persistency required, the meaning of abnormal aggressiveness, or what is to be considered seriously irresponsible conduct. This vagueness suggests that any disorder that is more than merely transitory with symptoms including anti-social behaviour could be included. This is a rather circular definition, as the disorder is itself diagnosed by the conduct it is that yields the diagnosis. The only point that limits its applicability is the requirement of treatability, although this does not relate to definitional elements.

This lack of specificity and over-inclusiveness in the definition has given rise to reduced popularity of the term 'psychopath' over recent years. Modern diagnostic practice indicates a preference for more social and descriptive classifications, such as 'antisocial personality disorder', 'sociopathy' and 'dissocial personality disorder'. However, in 1939, the British psychiatrist David Henderson[35] discussed the notion of the psychopath, and identified three sub-types, the inadequate, the aggressive, and the creative psychopath. The first two types are without doubt of the antisocial type, and are closely related to the one described by Cleckley in 1941, in the appropriately titled *The Mask of Sanity.*[36] Cleckley's description is now viewed as a classic authority on the concept. He utilized the term 'psychopathy' to describe those individuals who appeared sane due to their unimpaired cognitive faculties, but who were otherwise indistinguishable from psychotics. The personality type described in his writings is without doubt of the antisocial type.

In 1952, the American Psychiatric Association first published its Diagnostic and Statistical Manual of Mental Disorders[37], introducing the diagnostic category of 'sociopathic personality

[35] D. Henderson *Psychopathic States* (W.W. Norton 1939)
[36] Cleckley *The Mask of Sanity*
[37] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (APA Press 1952)

disturbance' with four subtypes, namely antisocial reaction, dyssocial reaction, sexual deviation, and addiction. The DSM recognised that this diagnosis was primarily a social one, pertaining to "conformity with the prevailing cultural milieu, and not only in terms of personal discomfort".[38] Antisocial reaction was said to be similar, albeit more specific, to psychopathic personality, and applied to individuals "who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code."[39] It went on to describe the individual with antisocial reaction as callous and hedonistic, emotionally immature, lacking in judgment as well as a having deficient sense of responsibility. The tendency of these individuals to rationalise antisocial behaviour was also included in the account. Dyssocial reaction suited those previously described under the terms 'pseudosocial personality' and 'psychopathic personality with asocial and amoral trends.'[40] Disregard for social norms was seen as an indicator for this subtype, "as the result of having lived all their lives in an abnormal moral environment."[41]

Sociopathic disturbance was exchanged for 'antisocial personality disorder'[42] in the DSM-II[43], which continues to be the diagnosis at present. The description was not drastically changed until the DSM-III[44], which improved on the preceding nebulous depictions by introducing compulsory and detailed criteria. This diagnosis is mostly behavioural, and attaches importance to a history of childhood conduct problems. Hence, it has a rather wide application in criminal populations.

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[38] Ibid., 000-x60.
[39] Ibid., 000-x61.
[40] Ibid., 000-x62.
[41] Ibid., 000-x62.
[42] Henceforth 'ASPD'.
[43] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders-II* (APA Press 1968)
[44] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders-III* (APA Press 1980)

On the year of the publication of the DSM-III, the Canadian psychologist Robert Hare published his preliminary findings on the assessment of psychopathy in criminal populations.[45] Largely based on Cleckley's description, Hare then developed a list of 20 criteria for diagnosing psychopathy, known as the Psychopathy Checklist.[46] The PCL-R[47] is divided into two factors, one representing the interpersonal aspect, the other the antisocial lifestyle. In recent years, this diagnostic tool has received immense support from researchers and practitioners alike.

In spite of the growing support for the term 'psychopathy', and in agreement with the American Psychiatric Association, the British government has chosen to dissociate itself from this term. In a series of official documents proposing the reform of the Mental Health Act 1983, a new category has been proposed, namely 'dangerous people with severe personality disorder'[48]. Despite its absence from the latest government document, the draft Mental Health Bill of 2002, the category remains an operational one, especially for research purposes. The category includes within it those individuals currently falling under the legal term 'psychopathic disorder', as defined by the Mental Health Act 1983. The DSPD category is defined to bring in individuals with an "identifiable personality disorder to a severe degree, who pose a high risk to other people because of serious anti-social behaviour resulting from their disorder".[49]

There are several problems with this new term and its definition, however. The main problem is the lack of a corresponding clinical diagnosis. Undoubtedly, legal insanity is as much a fiction as DSPD.

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[45] R.D. Hare "A Research Scale for the Assessment of Psychopathy in Criminal Populations" 1 *Pers Indiv Differ* 111-119
[46] R.D. Hare *Manual for the Hare Psychopathy Checklist-Revised* (MHS 1991)
[47] The Revised version of the Psychopathy Checklist – henceforth the 'PCL-R'.
[48] Henceforth 'DSPD'. See *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development*
[49] Ibid., at 9.

However, it may be a necessary evil, considering its purpose and status standardising issues of criminal liability. Granted, the DSPD category was not meant as a diagnosis. Nevertheless, in a field so beset with discord, it is precision, rather than yet another indistinct category, that is needed. At present, mental health professionals are reluctant to accept this new category of DSPD, hinting at its doubtful utility.[50]

Despite continuing dispute regarding the numerous phrases, psychopathy, regardless of its derogatory inferences, is robust enough to be sustained and thus shall be utilised in this thesis. The growing acceptance and support it has received from the clinical community through research and practice supports this conclusion.

1.4. What is Mental Disorder?

The phrase 'mental disorder' has received a variety of descriptions, from theological demonising to scientific disease. Definitions depend on one's starting point as a theorist and practitioner. Psychiatry, being a medical profession, views notions of mental disorder from a medical perspective, heavily relying on the medical model of health and illness. Psychology, especially its psychoanalytic branch, is more interested in the emotions and suffering of the patient and how they experience their mental health. Its conceptual framework concerns abnormality and pathology rather than illness and disease. Philosophical perspectives discuss conceptual, metaphysical, social, and epistemological issues arising out of the analysis of mental disorder. Of all, the psychiatric model is considered the official standard. Psychopathy can be shown to be a valid clinical mental disorder under all three conceptual understandings of mental disorder.

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[50] See A. Haddock *et al.*, "Managing Dangerous People with Severe Personality Disorder: A Survey of Forensic Psychiatrists' Opinions" 25 *Psych Bull* 293-296.

The psychiatric profession heavily relies on the medical model of disease,[51] focusing on aetiology, diagnosis, treatment and prognosis.[52] Despite basing itself on medical concepts of health and disease, the psychiatric model does acknowledge that 'mental illness' is often used to describe certain deviant behaviour.[53] It does so, however, believing that this behaviour is a symptom of an illness. The aberrant behaviour of the patient implies an underlying physical malfunction as its aetiology. Observations of this kind may give rise to a diagnosis, which requires a prediction and prognosis. These elements are fundamental to the psychiatric model and its conception of treatment. The aetiology of a mental disorder need not be identified for a diagnosis to be made, although a diagnosis may enable scientific research to discover the aetiology.[54]

The realm of abnormal psychology relies on definitions of psychological normality for its conceptions of abnormality. The variance of opinion on the meaning of these concepts derives from the fact that abnormality necessarily signifies a deviation from the norm, presumably the psychological norm, and thus the norm has to be defined. Possibly, this norm is statistical or social.[55] The challenge of these conceptions is the considerable variation among social norms, apparent in cross-cultural comparisons. Furthermore, mere non-compliance with social rules should not be automatically considered abnormal in psychological terms, as the term carries damaging connotations. Furthermore, society often benefits from rebellion, in art, as well as more organised fields such as science and

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[51] For discussion see Gerard "The Usefulness of the Medical Model to the Legal System"

[52] See M. Siegler and H. Osmond *Models of Madness, Models of Medicine* (MacMillan Publishing Co. 1974).

[53] See Gerard "The Usefulness of the Medical Model to the Legal System", at 380, where this is acknowledge as an elementary and universally agreed statement.

[54] See Siegler and Osmond *Models of Madness, Models of Medicine*, at 25.

[55] For further discussion of the meaning of abnormal and the variety of interpretations, see R.L. Atkinson *et al., Introduction to Psychology* (11th Harcourt Brace Jovanovich College Publishers 1993), pp. 616-665; R. Comer *Abnormal Psychology* (3rd Freeman 1998)

philosophy. Another more plausible view requires maladaptiveness of behaviour, emphasising the well being of the individual or society. Unfortunately, this does not resolve a balance between socially and personally maladaptive behaviour, allowing different rationales to place greater emphasis on one or the other. A third view emphasises personal distress and perceives individual's subjective experience of distress as the guide for psychological abnormality. Such focus on individuals takes the reins away from society and changeable norms. This model might exclude those who are undisturbed by their deviation and do not wish to be 'cured', such as psychopaths.

The philosophical view of mental health and disorder, despite being of long-standing,[56] is nowadays replaced by the medical model of mental illness.[57] It is, however, essential for a meaningful discussion of mental health. Plato[58] saw health in the soul as the harmonious and balanced functioning of the three elements of the organism, namely reason, spirit, and desire.[59] Reason connotes the pursuance of truth and knowledge, and is seen as a ruler over the other components in a psychologically healthy individual. The element of spirit represents emotions such as anger, will, conscience, and shame. Desire, in turn, chiefly stands for the physical cravings, hunger, thirst and sexual passions. A harmonious balance requires reason to act as guide, and the spirit and desire as motivation. This account of mental health has been said to correspond to Freud's

[56] The metaphor of mental health is as ancient as written word, with demonstrations in the Old Testament. Socrates and Plato seem to have been the first to use the concept as more than merely a metaphor. See A. Kenny "Mental Health in Plato's Republic" in A. Kenny (ed) *The Anatomy of the Soul: Historical Essays in the Philosophy of Mind* (Blackwell 1973), at 1.

[57] Which, of course, came into being thanks to Plato and his writings in Plato *Gorgias* (OUP 1920), an early Socratic dialogue, which dealt with the absolute nature of right and wrong, and Plato *The Republic* (Penguin Books 2003)

[58] In Plato *The Republic*, 434d-445e, where justice is defined.

[59] See Kenny "Mental Health in Plato's Republic" and R. Norman "Plato: The Health of the Personality" in R. Norman (ed) *The Moral Philosophers* (2nd edn OUP 1998) These were medical concepts used by Plato to apply to mental health

later tripartite division of the mind, into id, ego and superego.[60] The id represents the instinctual part, which may arguably correspond with Plato's desire. The ego symbolises the cognitive and perceptual processes, thereby matching Plato's reason. Freud's superego is associated with the conscience, the ideal. Plato's spirit is similar to the superego in that both are non-rational and punitive forces in the mind. There are, of course, differences, as Plato is likely to have considered some of Freud's superego components as belonging to reason, rather than the spirit. Furthermore, Plato's view does not allow for anything akin to a Freudian unconscious. However, they seem to agree, albeit crudely at times, on the need for a psychic harmony of the basic elements of the person.

Despite the differences in the various conceptions of mental health and disorder, they present us with a few key concepts with which to assess the validity of the disorder of psychopathy, to which we shall now turn. The variety of approaches, philosophical, psychiatric, and psychological, does not affect the thesis presented here. The evidence supporting the claim that psychopathy is a valid clinical disorder remains compelling irrespective of one's original discipline.

1.5. The Diagnosis of Psychopathy: Legitimate Disorder or Behavioural Construct?

Diagnosis of a disorder is seen as fundamental for the subsequent management of afflicted persons, from control of symptoms through the improvement of quality of life to the restoration to health. This is of great significance when relating to offenders, as the criminal justice system must manage appropriately as well as effectively, taking into account the aims of punishment. Thus, a diagnostic system, sufficiently efficient and reliable, is indispensable in both the mental health and the criminal justice sector.

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[60] See Kenny "Mental Health in Plato's Republic", at 10-14.

Arguments have been made doubting the legitimacy of the diagnosis of psychopathy, due to its intimate link with criminal activity.[61] If there is a conceptual link between the diagnosis and the criminal behaviour, with no other basis for the diagnosis, then the behaviour itself will automatically bring the diagnosis into play. This would have the unacceptable result of excusing those who are most vicious simply because of their behaviour: the more vicious the behaviour the more it is excused. This argument shall succeed if indeed psychopathy is a diagnosis that is solely shorthand for criminal behaviour. But is it? Lady Wootton, in an article discussing the responsibility issues relating to psychopathy,[62] argued that psychiatrists *rely solely* on the crime committed in making the diagnosis. She stated that "the signs and symptoms the psychiatrist recognises as dangerously prognostic must, in the nature of the case, generally be diagnosed after, not before, the prognosis proves to have been justified".[63] Inferences based on past behaviour, however, apply to many diagnoses of mental disorder.[64] Psychiatrists always note aberrant behaviour but the issue is whether the behaviour is symptomatic of some *underlying malfunction.*

Wootton seems to equate aberrant behaviour and criminal conduct. This raises a second issue. In fact, psychiatrists often have a view of behaviour that is not limited by offence definitions and convictions. To define a disorder based on criminal conduct would indeed be wrong. Criminal offences are defined by legislatures and adjust to changing social norms. However, disorder of the mind ought to be independent of such changing concepts. The behaviour symptomatic of the underlying mental condition may or may not be

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[61] See, for example, Wootton "Diminished Responsibility: A Layman's View"
[62] Ibid.
[63] Ibid., at 230.
[64] A diagnosis of schizophrenia, for example, is heavily dependent on behaviour inferences, such as disorganised behaviour and speech etc. See J. Morrison *DSM-IV Made Easy: The Clinician's Guide to Diagnosis* (Guilford Press 1995), at 134-148. Conversely, depression is often diagnosed from patients' self-reports of subjective distress.

criminal, but the main point here is that there will be such a condition underlying the behaviour. For assessment to follow peculiar behaviour is not unusual, but a diagnosis of clinical disorder typically requires more than just behavioural evidence. The question is whether such evidence exists in relation to psychopathy. It shall now be argued, on the basis of a review of the literature that a diagnosis of psychopathy is not mere shorthand for criminal behaviour but refers to independent underlying mental conditions that are themselves well evidenced. Here it is important to examine the various diagnostic tools used for psychopathy and its allied disorders. It will turn out that the plausibility of the objection is due to problems with certain diagnostic tools that have in fact been overcome.

There are three chief diagnostic tools currently in use, which may be of relevance for our purposes. These are the International Classification of Diseases[65] diagnosis of dissocial personality disorder, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders[66] definition of antisocial personality disorder, and the Hare Psychopathy Checklist Revised[67], which refers directly to psychopathy. The first two of these are diagnostic manuals highly accepted by mental health professionals worldwide, especially the DSM which is considered foremost. Each of these diagnostic instruments employs a different term, which shall be considered, each in turn.

The ICD-10 classification of Dissocial Personality Disorder is categorical,[68] and as such pays no heed to degrees of severity. Influenced by Cleckley's description of the psychopath, it identifies

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[65] W.H. Organisation *The International Statistical Classification of Diseases and Related Health Problems – 10* (10th 1992) Henceforth the 'ICD-10'.
[66] America Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. APA1994) Henceforth the 'DSM-IV'. ASPD is an Axis-II disorder.
[67] Hare *Manual for the Hare Psychopathy Checklist-Revised* (Henceforth the 'PCL-R'.
[68] The disorder is either present or absent.

a number of criteria for the diagnosis, some of which relate to character traits while others to behavioural patterns. Some of these criteria are, lack of capacity for empathy and guilt, irresponsibility and disregard for social norms, incapacity to maintain enduring relationships, low tolerance to frustration and low threshold for discharge of aggression, proneness to blame others, and persistent irritability.[69] It requires a deeply ingrained pattern of such maladaptive behaviour, becoming evident throughout adolescence, persisting throughout adulthood, and not infrequently decreasing in middle age. The vague description of personality traits in this diagnosis damages its scientific value as well as its reliability. Moreover, it has a tendency to over-diagnose personality disorders.[70] Thus, it is beginning to be seen as obsolescent.

The DSM-IVs ASPD is more frequently used and is the prevailing diagnosis today, remaining in high repute despite its flaws. Like the ICD diagnosis, ASPD is also a categorical diagnosis. Unlike the dissocial personality disorder, however, it emphasises behaviour, rather than personality traits, presumably due to the difficulty in accurately measuring personality traits.[71] The Manual stipulates that there must be a history of at least three symptoms of Conduct Disorder in adolescence,[72] and a minimum of four antisocial symptoms in adulthood. The symptoms are described in four subtypes, namely aggression against people or animals, deliberate property destruction, frequent lying or theft, and serious rule violation from a young age. Such misbehaviour may be placed on

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[69] Organisation *The International Statistical Classification of Diseases and Related Health Problems – 10*, F60.2.

[70] See V. Starcevic *et al.*, "Diagnostic Agreement Between the DSM-IV and ICD-10-DCR Personality Disorders" 30 *Psychopathology* 328-334

[71] However, the field trial showed that most of the personality traits traditionally used in describing psychopathy were just as reliable as those of the more behaviourally specific DSM items. See T.A. Widiger and E. Corbitt "The DSM-IV Antisocial Personality Disorder" in W J. Livesley (ed) *The DSM-IV Personality Disorders* (Guilford 1995)

[72] According to a follow-up study of 75 individuals diagnosed with Conduct Disorder it was found that 33% developed ASPD 19 years later: A. Storm-Mathisen and P. Vaglum "Conduct Disorder Patients 20 Years Later: A Personal Follow-up Study" 89 *Acta Psychiat Scand* 416-420

two intermingling continuums, namely chronology and severity. The historical aspects of the disorder are uppermost in terms of diagnosis, and so historical records are of more value than interviews, even though a structured interview is listed.[73]

The unmistakable emphasis on violent behaviour indicates an excessive prevalence in prison populations; approximately three-quarters of prisoners in the US suffer from ASPD according to some accounts.[74] Individuals with ASPD may indeed be easily identified in prisons, among habitual offenders, petty or not, but the diagnosis does not seem to have much value in identifying ASPD in the community. Approximately 3% of men in the North American community are said to suffer from ASPD.[75] As such it is an appropriate target of Lady Wootton's critique.[76] According to a recent extensive study of prison surveys across twelve countries, 47% of male prisoners and 21% of female prisoners were found to suffer from ASPD.[77] These results are considerably high and may suggest either diagnostic practices that are not rigorous enough or an over-inclusive diagnostic category. Either way, the disorder appears to be excessively prevalent.

Perhaps in order to narrow the application of ASPD, the Manual includes a description of features associated with the disorder,

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[73] Especially since subjects are likely to belittle discriminating accounts. See W.H. Reid "Antisocial Personality, Psychopathy and Forensic Psychiatry" *J Psychiat Practice* 55-58, at 55.

[74] See Morrison *DSM-IV Made Easy: The Clinician's Guide to Diagnosis*, "Cluster B Personality Disorders", at 474. Widiger and Corbitt "The DSM-IV Antisocial Personality Disorder" 50%-80% meet the criteria for ASPD diagnosis.

[75] Morrison *DSM-IV Made Easy: The Clinician's Guide to Diagnosis*, at 474. See also M J. Lyons and B.A. Jerskey "Personality Disorders: Epidemiological Findings, Methods, and Concepts" in M.T. Tsuang and M. Tohen (eds) *Textbook in Psychiatric Epidemiology* (2nd edn Wiley-Liss 2002), at 574, showing a range of 1.5% and 3.5% of the general population as suffering from ASPD. S. Torgersen *et al.*, "The Prevalence of Personality Disorders in a Community Sample" 58.6 *Arch Gen Psychiat* 590-596 This community study found ASPD present in 0.6%-0.7% of the sample.

[76] Mentioned above. See Wootton "Diminished Responsibility: A Layman's View"

[77] S. Fazel and J. Danesh "Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys" 359 *Lancet* 545-550

including such personality traits as lack of empathy, magnified self-appraisal, glib, and superficial charm. These traits are based on conceptions of psychopathy, rather than ASPD, and may be the cause of confused diagnoses. Disagreement between clinicians may occur as a result, for example, if one relies solely on the diagnostic criteria, namely the behavioural patterns, whereas the other includes the associated features, thereby narrowing the diagnosis. Such potential confusion is not resolved by the DSM-IV, and clinicians are not instructed as to how to make such diagnosis.[78]

Studies analysing the agreement between ASPD and dissocial personality disorder have produced disconcerting results. The discordance between the ICD-10 and the DSM-IV is significant enough to engender doubt in relation to these diagnoses. Despite being moderately concordant in relation to some personality disorders, the instruments are in considerable conflict in relation to these two disorders.[79] Bearing in mind the fact that each of these instruments emphasises different points of the disorder, discord is not surprising. The ICD-10 targets lack of empathy and relationship instability, whereas the DSM-IV is directed at antisocial behaviour.

In opposition to these two diagnostic manuals, the PCL-R refers exclusively and specifically to psychopathy. It is also more comprehensive and reliable than the diagnoses of ASPD and dissocial personality disorder. The checklist consists of a list of symptoms, referring to behaviour as well as inferred personality traits. It presents numerical scores, which reveal the degree of symptoms measured up to the established clinical perception of psychopathy. It specifies the methods that must be used for

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[78] See R.D. Hare "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion" 13.2 *Psychiat Times* 39-40

[79] H. Ottosson *et al.*, "Cross-System Concordance of Personality Disorder Diagnoses of DSM-IV and Diagnostic Criteria for Research of ICD-10" 16.3 *J Pers Disorders* 283-292

assessing individual psychopaths, namely a semi-structured interview and file information including historical and other records. The checklist is composed of two factors, the first dealing with the affective and interpersonal qualities of the disorder and the second with the associated socially deviant behaviour. Hitherto, numerous studies have found that the checklist is reliable in identifying psychopaths in different settings and predicting recidivism. The PCL-R has been used to develop the Psychopathy Screening Device[80] to measure psychopathic qualities in children, as well as in youth,[81] with promising results.[82] The diagnosis of psychopathy itself is considered inappropriate for the diagnoses of children, partly due to the stigma attached.[83] Additionally, some of the characteristics of psychopathy are normal in children, such as lack of shame, and underdeveloped conscience, and those traits should not be seen as maladaptive and fixed.

Before discussing the PCL-R in detail, it is worth noting that it is closely based on Hervey Cleckley's *The Mask of Sanity*[84]. Cleckley's clinical description of the typical psychopath is divided into sixteen characteristics.[85] The typical psychopath is superficially charming and intelligent, although his intelligence is purely cognitive and totally lacking in 'emotional intelligence'.[86] Psychoneurotic manifestations are usually absent, as well as delusions and other symptoms of irrationality or cognitive impairment. Anxiety and other worries generally do not afflict the psychopath, allowing his

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[80] See D.R. Lynam "Early Identification of the Fledgling Psychopath: Locating the Psychopathic Child in the Current Nomenclature" 107.4 *J. Abnorm. Psychol.* 566-575, at 567.

[81] See the A.E. Forth *et al., The Psychopathy Checklist: Youth Version* (MHS 1994) (PCL:YV).

[82] See D.S. Kosson *et al.,* "The Reliability and Validity of the Psychopathy Checklist: Youth Version (PCL:YV) in Nonincarcerated Adolescent Males" 14.1 *Psychol Assessment* 97-109

[83] For example, Mary Bell, who at the age of 11 was identified as a psychopath, is now a healthy law-abiding citizen. See G. Sereny *Cries Unheard – The Story of Mary Bell* (Papermac 1999)

[84] Cleckley *The Mask of Sanity*

[85] Ibid., Part III – "A Clinical Profile", pages 337-364.

[86] See D. Goleman *Emotional Intelligence: Why It Can Matter More than IQ* (Bloomsbury 1995), especially pages 106-110 on psychopaths.

casual serenity to remain untouched. Reliably unreliable, the psychopath is at times apparently kind, honest, and responsible, and then, unpredictably, bluntly untruthful and insincere. His total lack of shame and remorse allow him to lie in the face unmistakable evidence, as well as to incessantly contradict his own lies. His antisocial behaviour is so easily triggered he commonly breaks the law for ridiculously small incentives at incredibly high risks of detection. This results in behaviour that appears either totally irrational or simply utterly wicked. This absurd lack of judgment is astonishing considering his unscathed rational abilities. However, his inability to learn from experience, either by way of censures or rewards, explains his comprehensive lack of prudence. The typical egocentricity is pathological and exists both in temporal and subjective realms. Ordinary egocentricity implies concern with self which often manifests itself in concern for long-term as well as short-term benefits. Not so with the psychopath who appears to be blind to his long-term interests. His general poverty of emotions exhibits itself in his incapacity for "affective attitude(s) strong and meaningful enough to be called love".[87] Not necessarily arctic cold, the psychopath does exhibit 'quasi-emotions', namely depleted and immature emotions. He may also have a sense of humour, but one lacking in insight. "He jests at scars who never felt a wound".[88] His insight into himself and others is both shallow and without practical effect. His use of insightful words is devoid of a genuine understanding of their meaning and emotional baggage. Thus, he is unresponsive in relationships and behaves kindly or callously at whim irrespective of how he is treated.

The picture presented in this description is rather distasteful, and one ought to bear in mind that the charm and manipulativeness characteristic of the psychopath often mask the sordidness sufficiently well to blind others to what is behind the appearance.

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[87] Cleckley *The Mask of Sanity*, at 347.
[88] Ibid., at 349.

The absence of a diagnosis associated with this description prompted Hare to develop the PCL-R, which aims to operationalise Cleckley's concept of psychopathy. Going beyond this description, Hare established a reliable and valid assessment of psychopathy. This 20-item device is scored on a scale of 0 to 40,[89] with a cut-off of 30 as the point where a diagnosis is made. Apart from three, the items are allocated into the two factors mentioned above: affective/interpersonal qualities and associated deviant behaviour. The three supplemental items are promiscuous sexual behaviour, numerous short-term marriages, and criminal versatility. All items are rated on a 3-point scale, ranging from 0 to 2, based on a semi-structured interview as well as collateral data.

Factor 1 depicts the manner in which psychopaths interact with others as well as their emotional style. So, their shallow affect and lack of empathy or guilt are included, as well as their charming and manipulative manner of behaviour. A grandiose sense of self-worth, pathological lying, and a failure to accept responsibility for his own actions are also factors listed here. These items tend to remain constant throughout the life of a psychopath.[90]

Factor 2 describes psychopathic behavioural patterns, and is thus the only factor correlated with the ASPD diagnosis. It includes items such as impulsivity and the related need for stimulation and proneness to boredom. The parasitic lifestyle of the psychopath is listed, along with his irresponsibility, history of behavioural problems, and juvenile delinquency. This factor also records the poor behavioural controls of psychopaths and their lack of realistic and long-term goals.[91] These items are seen to diminish with age,

[89] R.D. Hare and S.D. Hart "Psychopathy, Mental Disorder, and Crime" in S. Hodgins (ed) *Mental Disorder and Crime* (Sage Publications 1993)
[90] R.D. Hare "Psychopathy: A Clinical Construct Whose Time Has Come" 23.1 *Crim Justice Behav* 25-54
[91] Revocation of conditional release is also an item listed under Factor 2.

illustrated by the reduced criminal activity of psychopaths in middle age.[92]

Recent evidence shows that psychopaths exhibit subtle but unequivocal physiological, neurological and cognitive differences compared to non-psychopaths. These studies show a marked deficiency in psychopaths relating to both language and emotional processing. Such inadequacies correspond to both Cleckley's and the PCL-R's description of psychopathic traits and behaviour.

Research into word response has shown that the reaction of psychopaths to negatively loaded emotional words is both slower and less accurate compared to normal controls.[93] This suggests that psychopaths experience emotions in a less intense way compared to non-psychopaths. Psychopaths also respond to all words as if they are neutral, showing no difference in responsivity between emotionally charged and neutral words.[94] Furthermore, the memory of psychopathic offenders does not distinguish between neutral and emotional slides and words.[95] General research on memory shows that people tend to remember emotional events better than neutral events.[96] Unlike ordinary individuals, psychopaths do not distinguish between emotional and non-emotional memories. The startle-reflex of psychopaths is also damaged. Non-psychopaths show large and fast blink reflexes when watching unpleasant slides,

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[92] Hare "Psychopathy: A Clinical Construct Whose Time Has Come"
[93] R. Day and S. Wong "Anomalous Perceptual Asymmetries for Negative Emotional Stimuli in the Psychopath" 105.4 *J. Abnorm. Psychol.* 648-652
[94] See K.A. Kiehl *et al.,* "Semantic and Affective Processing in Psychopaths: An Event-Related Potential (ERP) Study" 36.6 *Psychophysiology* 765-774 Some words offered were emotionally charged, negatively or positively, such as 'cancer' and 'love', respectively.
[95] S.-A. Christianson *et al.,* "Remembering Details of Emotional Events: A Comparison Between Psychopathic and Nonpsychopathic Offenders" 20.4 *Pers Indiv Differ* 437-443
[96] S.-A. Christianson and E.F. Loftus "Remembering Emotional Events: The Fate of Detailed Information" 5 *Cognition Emotion* 81-108

compared to pleasant slides. Psychopaths showed no reaction either in startle magnitude or latency.[97]

Thus, it appears that the mechanism that normally communicates affect to cognitive processes might be ineffective or inoperative in psychopaths.[98] Further research is necessary to elucidate whether the part of the brain that resolves emotions is completely inactive in the psychopath, or whether it is the wiring linking emotions to pieces of information that is deficient. In the interim, we can at least appreciate that there is an affective inadequacy in the psychopathic personality, possibly explaining at least in part the behaviour attached to that disorder.[99]

These findings closely relate to the brain differences between psychopathic and non-psychopathic individuals. The area of the brain seen to process emotional memories is the amygdala,[100] which is deficient in psychopaths.[101] Innovative research in brain imaging,[102] illustrates the decreased utilization of certain areas of the

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[97] C J. Patrick *et al.,* "Emotion in the Criminal Psychopath: Startle Reflex Modulation" 102.1 *J. Abnorm. Psychol.* 82-92

[98] Hare "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion" A recent study by W. Larbig *et al.,* "Cerebral and Peripheral Correlates of Psychopaths During Anticipation of Aversive Stimulation" (*Annual Meeting of the Society for Psychophysiological Research* 1992), studying the processing and use of linguistic and emotional information – compared with normal individuals, psychopaths are less able to process or use the deep semantic meanings of language and to appreciate the emotional significance of events or experiences.

[99] This is consistent Cleckley's description: "despite his otherwise perfect functioning, the major emotional accompaniments are absent or so attenuated as to count for little", Cleckley *The Mask of Sanity*, at 371.

[100] See Goleman *Emotional Intelligence: Why It Can Matter More than IQ*, pp.13-29.

[101] R. Veita *et al.,* "Brain Circuits Involved in Emotional Learning in Antisocial Behaviour and Social Phobia in Humans" 328 *Neuroscience Letters* 233-236; J. Tiihonen *et al.,* "Amygdaloid Volume Loss in Psychopathy" *Society for Neuroscience Abstracts* 2017, presented neuro-imaging data showing reduced amygdala volume in psychopathic individuals. K.A. Kiehl *et al.,* "Limbic Abnormalities in Affective Processing by Criminal Psychopaths as Revealed by Functional Magnetic Resonance Imaging" 50 *Biol Psychiat* 677-684, found reduced amygdala activation in psychopathic individuals during an emotional memory task.

[102] See, inter alia, J. Intrator *et al.*, "A Brain Imaging (Single Photon Emission Computerised Tomography) Study of Semantic and Affective Processing in Psychopaths" 42 *Biol Psychiat* 96-103; Kiehl *et al.,* "Semantic and Affective Processing in Psychopaths: An Event-Related Potential (ERP) Study"; Patrick *et al.,* "Emotion in the Criminal Psychopath: Startle Reflex Modulation"; A. Raine *et*

brain of the psychopath, in contrast to the non-psychopathic brain, when processing emotionally charged words and images. These indicate a neurophysiological basis for some of the characteristics of psychopaths, such as lack of empathic capacity or guilt and shallow emotions, implying a neurobiological deficit in psychopaths, either in processing emotions per se or in the transmitting mechanism associated with emotional meaning.

We are now in a better position to assess the objection to the diagnosis of psychopathy mentioned at the outset of this section. Psychopathy, diagnosed by the PCL-R, is not vulnerable to the criticism directed at ASPD. It is neither tautological shorthand for behaviour and cannot be reduced to a merely social phenomenon. It is a diagnosis that is significantly evidence-based and supported by extensive psychological research. Furthermore, psychopathic individuals are differentiated from other offenders by their unique characteristics, which are not reflected in the ASPD diagnosis.[103] Additionally, the majority of individuals with ASPD do not meet the criteria for psychopathy, whereas most psychopaths[104] meet that of ASPD.[105]

The PCL-R has been criticised for making value judgments, for instance in employing descriptions such as 'superficial charm'.[106] However, this criticism applies to all descriptions of psychopathy, and in fact condemns the use of 'mental disorder' in relation to aberrant behaviour in general, which has historically been the

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al., "Reduced Prefrontal Gray Matter Volume and Reduced Autonomic Activity in Antisocial Personality Disorder" 57.2 *Arch Gen Psychiat* 119-127

[103] See R.D. Hare "Psychopaths: New Trends in Research" 12 *Harv. Ment. Health Lett.* 4-5

[104] Excluding those who avoid formal contact with the criminal justice system.

[105] Hare "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion"

[106] See D. Tantam "The Limitations and Dangers of Checklists for Anti-Social Behaviour" (*Squaring the Circle Conference* 1999)

custom.[107] Mental health professionals regularly make moral judgments, as definitions of abnormal psychology demonstrate. The acceptability of the moral model in mental health circles is especially noticeable in the theory and practice of behavioural therapy.[108] Hence, this argument does not damage the viability of the disorder.

Overall, it is quite clear that PCL-R psychopathy is specific and internal enough to meet the criteria of a clinical mental disorder.

Perhaps the true dignity of man is his ability to despise himself[109]

1.6. Is Psychopathy a Taxon?

The question on many theorists' minds is whether or not psychopathy can be seen as taxonomy.[110] Essentially, the question concerns whether psychopathy is a separate independent category, or merely an extreme degree of maladjustment of personality. "Taxon" has been defined as an "entity, type, syndrome, species, disease, or more generally, a non-arbitrary class."[111] Therefore, if a correlative relationship exists between the disorder and its manifestations, it may be deemed taxonomous. Psychopathy may either be qualitatively or quantitatively different from the normal personality.

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[107] See a genealogy of mental disorder and society's reaction to it in M. Foucault *Madness and Civilization – A History of Insanity in the Age of Reason* (Tavistock Publications 1977).

[108] See discussion of the moral model of madness in M. Siegler and H. Osmond "The Discontinuous Models of Madness" in M. Siegler and H. Osmond (eds) *Models of Madness, Models of Medicine* (MacMillan Publishing 1974).

[109] George Santayana

[110] As aforementioned, ASPD and dissocial personality disorder are both seen as categorical.

[111] P.E. Meehl and R.R. Golden "Taxometric Methods" in P.C. Kendall, & Butcher, J.N. (ed) *Handbook of Research Methods in Clinical Psychology* (Wiley 1982), at 127.

Both Cleckley[112] and Hare[113] seem to regard psychopathy as an extreme case on a continuum of personality, rather than a taxon. The scoring system of the PCL-R suggests psychopathy exists in degrees, from naught to full-blown. This, in itself, does not prevent psychopathy from being a category on its own, as such measurement may be used to detect a discrete entity, especially in the extreme case. However, the background of these conceptions is personality-based, and thus it is more viable to view these conceptions dimensionally rather than categorically.

Consistent with a continuous, rather than a categorical, analysis of psychopathy, severity has been divided into three degrees, namely mild, moderate and severe, with associated scores of 10-19, 20-29 and 30-40, respectively.[114] Such assessment of disorder severity may assist in assigning management approaches and predicting treatment success. Individuals scoring low on the PCL-R would be able to receive the least restrictive treatment alternative, while those scoring high would be more likely to be preventatively detained.

However, there is evidence supporting the validity of PCL-R psychopathy[115] as a taxon.[116] Accordingly, a cut-off score of 19 or 20 optimally distinguishes between members of the taxon group and non-members. A higher cut-off of 25 produced a purer taxon sub-group.[117] It being a lower cut-off than that recommended by Hare, namely 30,[118] suggests caution on behalf of the PCL-R. Conversely, more recent research showed that the optimal cut-off point for a

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[112] The discussion in Cleckley *The Mask of Sanity*, especially in relation to incomplete manifestations, suggests the existence of degrees of pathology.
[113] Hare *Manual for the Hare Psychopathy Checklist-Revised*
[114] See R J. Meloy *The Psychopathic Mind: Origins, Dynamics, and Treatment* (Jason Aronson Inc 2002), at 317-318.
[115] Especially Factor 2.
[116] See G.T. Harris *et al.*, "Psychopathy as a Taxon: Evidence That Psychopaths Are a Discrete Class" 62.2 *J Consult Clin Psych* 387-397, where four taxometric methods were used.
[117] Ibid.
[118] Hare *Manual for the Hare Psychopathy Checklist-Revised*

point for a psychopathic taxon exists between 28 and 32, along the lines of the recommended cut-off.[119]

It was further found that childhood behaviour problems were good indicators of taxon, which suggests the possibility of early identification of future psychopaths.[120] Uncertainty arises when recognising that not all children who exhibit such signs of membership of the taxon group develop into offenders in adulthood. This might support the proposition that there are psychopaths who do not commit crimes.[121]

The evidence of taxonomy is insufficient for a confident diagnosis, and so viewing psychopathy as an acute case of disordered personality on a continuum is preferable. Furthermore, the noticeable existence of several of the psychopathic personality traits in 'normal' individuals evokes the aphorism that madness is "you or me amplified".[122]

1.7. Aetiology

The evidence of neurobiological differences between psychopaths and non-psychopaths are significant, although they do not reveal the origin of these dysfunctions.[123] Despite the fact that aetiology is not essential for management selection, familiarity with it may shed light on the nature of the disorder as well as prevention alternatives.

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[119] See R.D. Hare "Psychopaths and Their Nature: Implications for Mental Health and Criminal Justice System" in T. Millon, E. Simonsen, M. Birket-Smith and R.D. Davis (eds) *Psychopathy: Antisocial, Criminal, and Violent Behaviour* (Guilford Press 2003), at 194-195, citing a personal communication with David Cooke.

[120] Harris *et al.,* "Psychopathy as a Taxon: Evidence That Psychopaths Are a Discrete Class"

[121] C.S. Widom "A Methodology for Studying Non-Institutionalised Psychopaths" 45. Ibid. 674-683; C.S. Widom and J.P. Newman "Characteristics of Non-Institutional Psychopaths" in D.P. Farrington, & Gunn J. (ed) *Aggression and Dangerousness* (Wiley 1985).

[122] "Girl, Interrupted" Susanna Kaysen, narrating.

[123] See G.T. Harris *et al.,* "The Construct of Psychopathy" 28 *Crime & Just* 197-264, at 197.

Analysing the aetiology of one of the main deficiencies of the psychopath, namely lack of empathy, may assist in appreciating the aetiology of psychopathy in general.

Empathic ability is often considered essential for mature moral judgment,[124] as well as a constituent of a mature conscience. This constituent involves the "projection (not necessarily voluntary) of the self into the feelings of others",[125] and implies psychological involvement.[126] The term was coined in the late 19th century in Germany,[127] meaning 'feeling-into'. Despite the obvious emotional element featuring in this expression, one of the two psychological definitions of empathy is devoid of such emotion. This characterisation entails cognitive awareness of the internal situation of another,[128] and involves the process of perspective taking. Psychopaths, not being cognitively disordered, may indeed posses some of the requisites for intellectual empathy.

Indeed, psychopathic offenders with high IQ score higher on self-reported empathy questionnaires.[129] This involves psychopaths answering questions geared at testing their empathic reactions to situations. Their high intelligence appears to increase their success in these questionnaires. High intelligence would enhance the awareness of these psychopaths to others' expectations, thereby refining their manipulative abilities. These displays of "empathy"

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[124] See M.L. Hoffman *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge University Press 2000); A. Hass *Doing the Right Thing: Cultivating Your Moral Intelligence* (Pocket Books 1998), where empathy is listed as a key to morality, chapter 1; See also M. Borba *Building Moral Intelligence: The Seven Essential Virtues that Teach Kids to do the Right Thing* (Jossey-Bass 2001), ch. 1, where empathy is listed as the first essential virtue of moral intelligence.
[125] A. Bullock *et al.,* (eds) *The Fontana Dictionary of Modern Thought* (2nd Fontana Press 1988), at 268.
[126] Ibid.
[127] Einfuhlung, developed by H.R. Lotze *Mikrokosmos. Ideen zur Naturgeschichte und Geschichte der Menschheit. Versuch einer Anthropologie* (6th Meiner 1923).
[128] See, for example, W. Ickes "Empathic Accuracy" 61 *J. Pers.* 587-610.
[129] See A.B. Heilbrun "Cognitive Modes of Criminal Violence Based Upon Intelligence and Psychopathy Levels" 50 *J Consult Clin Psych* 546-557.

are not good measures of genuine empathy, but are merely simulations of expected reactions.

This is consistent with reports that psychopaths[130] who are given therapy aimed at increasing empathy are more likely to recidivate than those not undertaking therapy.[131] Psychotherapy may be the means by which psychopaths acquire information about people's expectations, thus enabling them to manipulate successfully therapists, convincing them they are capable of empathy. It is consistent with Cleckley's account of the emotional poverty of psychopaths and their good intelligence.[132] Even the highly intelligent psychopath is emotionally hollow.

The second psychological definition of empathy does not dispense with cognition entirely, but sees it as an intuitive process.[133] Accordingly, empathy is made up of two components, namely the capacity to enter into another's shoes, and the instinct to react properly.[134] Both appear to be absent in the psychopath, for whom there is not inner pressure to react in ways other than to satisfy one's own urges. Thus, he is presented with a variety of alternative behaviours.[135] He has a pseudo-menu of atrocious options which would not occur to or would be inhibited in the non-psychopath. At the same time, behaviour choices grounded in concern for others would not occur to the psychopath. Hypothetically,[136] the

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[130] Psychopaths of unspecified intelligence, as intelligence assessment was not part of these studies.
[131] See M.E. Rice *et al.*, "An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders" 16 *L & Hum Behav* 399-412.
[132] Cleckley *The Mask of Sanity*
[133] Hoffman *Empathy and Moral Development: Implications for Caring and Justice* (ch. 2, pp. 29-62, especially 29-30. See also R. Karniol and D. Shomroni "What Being Empathic Means: Applying the Transformation Rule Approach to Individual Difference in Predicting the Thoughts and Feelings of Prototypic Others" 29 *Eur J Soc Psychol* 147-160.
[134] E.T. Barker and B. Shipton "The Partial Psychopath" (*Psychopathy and Consumerism: Two Illnesses that Need and Feed Each Other* 1995).
[135] Ibid.
[136] As this is obviously not the case – this does not occur to the psychopath.

question facing the psychopath is 'why should[137] I behave in any way other than to suit myself?'[138] The path from self-absorption does not lie with cognition, as it will not motivate him to act;[139] rather, it lies with the capacity to experience empathy with the emotions and suffering of others.[140]

Empathic ability develops throughout the years of a person's life, and is highly influenced by the parent-child relationship.[141] The development of attachment during the formative years of childhood is essential for a child to acquire an understanding of the effect his actions have on others. For this to transpire, parents need to show recognition of the child's signs and secret codes and react to them consistently. Should the presence of people surrounding the child lack consistency, his intuition vis-à-vis others as well as his language development will not be fully formed.[142]

In the absence of a single person on whom the child relies for regular interaction, fear of taking roots may take hold. This lack of stability in early life produces an emotional promiscuity appropriate in infancy, which essentially causes him to be "interested in everyone but loving no one".[143] Other upshots to this lack of attachment are a bankrupt emotional scope, an undeveloped conscience, undeveloped faculties of self-criticism and self-observation, incapability to form long-standing relationships and

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[137] Or ought.
[138] This does not refer to cases of irresistible impulse.
[139] Essentially, this is a question of action, rather than the aetiology or content of moral norms.
[140] B. Williams "The Amoralist" in B. Williams (ed) *Morality* (1993), discusses an amoralist analogous to, if not the same as, the psychopath. At 7-8: "The effects of moral education can actually be to make people want to act, quite often, in a non-self-interested way, and it often succeeds in making it at least quite difficult, for internal reasons, to behave appallingly."
[141] R. Plutchik "Evolutionary Bases of Empathy" in N. Eisenberg and J. Strayer (eds) *Empathy and its Development* (Cambridge University Press 1987).
[142] P. Leach "How and Why Changing Caregivers Damage a Young Child" (*Psychopathy and Consumerism: Two Illnesses That Need And Feed Each Other* 1995).
[143] Ibid.

the inability to constrain stress, thus making the person 'short-fused'. All these qualities are present in the typical psychopath.

This may suggest that nurture and environment play a role in the development of psychopathy. However, like the nature-nurture debate, aetiology is hardly straightforward, and one must allow other factors to play a role. Genetics, organic and biochemical factors may also be a part of the equation.[144] There is indeed evidence that supports the idea of an interacting relationship between genetics and environment in the aetiology of violence in general.[145] Regrettably, such research is not specific to psychopathy. Neuroscience is not sufficiently advanced to explain the basic anatomy of the human brain, let alone the areas controlling mental health.[146] It is hard to say whether these individuals were born with brain deficiencies or whether these deficiencies developed due to nurture. These brain differences may suggest that the disorder is organically caused. It is also possible that the brain differences evident in adult psychopaths are the result of these areas of the brain not developing properly due to environmental influences. Longitudinal research following the brain changes from childhood to adulthood may help resolve this dispute. The same applies to genetic research. Innovative research into the genetic factors responsible for mental disorders is on its way, and will improve general understanding of the disorder of psychopathy.

1.8. Conclusion

Due to the complexity of the assessment of personality traits, reaching an agreement as to the behavioural aspects of psychopathy

[144] Barker and Shipton "The Partial Psychopath"
[145] P. McGuffin and A. Thapar "Genetics and Antisocial Personality Disorder" in T. Millon, E. Simonsen, M. Birket-Smith and R.D. Davis (eds) *Psychopathy: Antisocial, Criminal, and Violent Behaviour* (Guilford Press 2003). See also M. Bohman "Predisposition to Criminality: Swedish Adoption Studies in Retrospect" in G.R. Bock and J.A. Goode (eds) *Genetics of Criminal and Antisocial Behaviour* (Wiley 1996).
[146] McGuffin and Thapar "Genetics and Antisocial Personality Disorder"

is more feasible. Further research will enhance such understanding and enable a superior clinical description of the disorder. Considering the inherent mystery of personality in general, as well as mental disorder in particular, enigmas are intrinsic to this discussion.

In this section, a reply has been offered to two potential criticisms of the approach presented here: that psychopathy is a mere social construction, and that it is conceptually linked to behaviour in such a way as to make it not a genuine clinical disorder. It has been argued here that these objections are contradicted by the current state of research and diagnostics regarding psychopathy.

Consider schizophrenia. The initiation of the condition into psychiatry was not without struggles and uncertainties. Following the identification of the condition,[147] several terms were used to describe the condition and various criteria were used for diagnosis.[148] There was a immense misunderstanding of the condition. Consequently, stigmatising not too dissimilar to that attached to psychopathy, associated itself with schizophrenia, such as reference to moral decay.[149] Serious doubts were made in relation to the condition,[150] analogous to the urging for further research into psychopathy. Advanced research into schizophrenia augmented knowledge, producing a more coherent clinical description, in turn helping in the development of treatment.[151] Nonetheless, the aetiology of schizophrenia remains obscure, a fact, which does not diminish the status of the condition as a mental disorder.

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147 Using numerous terms to describe the condition, e.g. Folie Circulaire. See B. Green "A Review of Schizophrenia" (2000) Priori Medical Journals <http://www.priory.com/schizo.htm>.
148 Ibid.
149 Laura Lee Hall, PhD, *Schizophrenia Neuroanatomy Comes of Age*, National Alliance for the Mentally Ill, http://www.nami.org/disorder/schizophrenia_hall1.htm, at 1.
150 Schizophrenia Homepage "A Short Introduction to Schizophrenia" <http://www.schizophrenia.com/family/schizintro.html> at 1.
151 Although, like for psychopathy, there is still no cure.

A condition should not be deemed a fiction simply because it is misunderstood, as absence of evidence is not evidence of absence.

"It is not necessary that you be convinced of the truth of a particular hypothesis to justify devoting one's energies to testing it. It is enough that one regard it as worth testing and finding the tools to be adequate."[152]

[152] Kety, S. Quote cited in F.M. Benes "Model Generation and Testing to Probe Neural Circuitry in the Cingulate Cortex of Postmortem Schizophrenic Brain" 24.2 *Schizophrenia Bull* 219-230.

CHAPTER TWO: THE RESPONSIBILITY OF PSYCHOPATHS

2.1. Introduction

The question of whether to hold offenders suffering from psychopathy accountable for their criminal behaviour has been repeatedly debated among legal theorists and philosophers alike.[1] This issue of accountability is a fundamental query the criminal justice system has to resolve prior to penalising an offender for his criminal behaviour. A necessary condition for accountability is moral agency. Moral agency refers to one's psychological capacity to make autonomous moral decisions. In the absence of moral agency, for example in the case of the very young,[2] one cannot be held accountable for his actions. The law recognises the need for moral agency as a prerequisite for culpability judgements when it refuses to hold young children accountable for their illegal acts. Some would construe the reason for not legally blaming children narrowly, suggesting that children cannot actually break the law as they cannot – or do not – have the requisite guilty mind. This, however, is a simplistic view of both the law and culpability. The reason why young children cannot form the requisite mental elements for crimes is that they lack basic capacities that are indispensable for making moral decisions. They have yet to develop the mature and autonomous status of moral agency. Thus, a child aged five could arguably commit homicide, causing the death of another human being with intent to cause grievous bodily harm. We

[1] See, for example, R.A. Duff "Psychopathy and Moral Understanding" 14.3 *Am Philos Quart* 189-200; G. Adshead "Psychopathy, Other-Regarding Moral Beliefs and Responsibility" 3.4 *Phil Psychiat Psych* 279-281; Arenella "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability"; J.G. Murphy "Moral Death: A Kantian Essay on Psychopathy" 82.*Ethics* 284-298; C. Ciocchetti "The Responsibility of the Psychopathic Offender" 10.2 *Philosophy, Psychiatry, & Psychology* 175-183; J. Kennett "Autism, Empathy, and Moral Agency" 52.208 *Philos Quart* 340-357.

[2] The age of criminal responsibility is 10. The common law presumption of incapacity related to children between the ages of 10 and 14 has been abolished by the Crime and Disorder Act 1998, section 34.

may rebuke the child for his conduct, but such a young child is yet incapable of autonomously making moral decisions. It is this incapacity of the young child that precludes us from viewing him as altogether culpable.

Moral agency, however, is not a sufficient condition for accountability. A moral agent would not be held accountable for harm caused while involuntarily unconscious. For example, we would not hold a moral agent accountable for a car accident caused by a temporary loss of control over his car due to a "blow from a stone or an attack by a swarm of bees."[3] Moral agency is therefore a necessary but insufficient condition for legal accountability.

In the majority of cases moral agency is assumed as given, while the issue commonly debated is the subsistence of the *mens rea* relevant to the crime in question. The term *mens rea* relates to the state of mind of the offender at the time of the offence, the absence of which is usually a matter for the defence to introduce.[4] The change of status of the actor from 'moral agent' to 'not a moral agent' surfaces in the defence of insanity which rebuts the presumption of normality.[5] Arguably, this issue is so fundamental to the proceedings of criminal justice that it ought to be decided at the commencement of the criminal trial. This is, however, impracticable for two main reasons. First, it is rather time consuming and could significantly increase the costs to question the responsibility of each and every accused. Second, in the majority of cases, the actor is indeed a moral agent, and so the presumption of agency is appropriate. Despite the benefits of presuming moral agency, it is here argued that this view is not always proper. Psychopathy, it is here maintained, is a disorder that impairs agency

[3] *Hill v Baxter* (1958) 1 Q.B. 277 at 283, per Lord Goddard.
[4] For analysis of the concept, see J. Hampton "Mens Rea" in E.F. Paul, F.D. Miller and J. Paul (eds) *Crime, Culpability, and Remedy* (Blackwell 1990).
[5] See A. Ashworth *Principles of Criminal Law* (2nd ed Clarendon Press 1995), at 202, regarding the presumption of 'normality'.

and so should be considered an exception of the presumption of agency. On first reflection, it would appear that the law does not recognise psychopathy as an exception to the presumption of moral agency. The only complete defence recognising lack of moral agency granted by the law applies to individuals whose cognitive capacities are damaged.[6] The damage to the moral agency of psychopaths, however, comes from their deficient affective, rather than cognitive, capacities. The law would therefore appear to discount the necessity of affective capacities for moral agency. The law's attitude, however, is not as straightforward as that. The defence of diminished responsibility takes psychopathy into account as a disorder diminishing responsibility for the offence of murder. The diminished responsibility defence does not acknowledge psychopathy or any other disorder of mind as a complete denial of moral agency. It is a merely partial defence that reduces a conviction from one of murder to manslaughter. This limitation, however, is not a blanket rejection of psychopathy as a diminishing disorder. The law, via the defence of diminished responsibility, acknowledges that psychopathy is a disorder that might damage moral agency. Therefore, one cannot say that the law completely discounts psychopathy as a disorder affecting agency. Philosophically, the law recognises that psychopaths may not always be full moral agents in regards to the commission of murder.

Is this evidence, however, sufficient to suggest that the law should not hold psychopaths accountable for their criminal behaviour? Some would deny that this is an adequate reason to excuse psychopaths their illegal behaviour, and focus on the apparently healthy cognitive capacities of the psychopath. The problem with this general view is twofold. First, this view assumes that cognitive capacities are sufficient for moral agency. It views moral agency as based on the capacity for reason, which psychopaths apparently possess. This view, however, ignores the significance of affective

[6] The English version of the insanity defence based on M'Naghten.

capacities as motivators of moral behaviour, and the possession of moral agency. Philosophical and psychological theories of moral agency provide support for the argument that certain affective capacities are necessary, albeit insufficient, for moral agency. Empirical evidence suggests that psychopaths lack those requisite affective capacities that would enable one to make autonomous moral decisions.

Second, this general view of psychopathy assumes that the superficial appearance of cognitive health is sound. Not so. Psychopaths may appear to be rational agents, but their rationality is merely a mask of sanity veiling cognitive inadequacy. The practical reasoning of the psychopath is damaged, as he is "incapable of forming a coherent plan of action".[7] Prudence, the ability to cautiously consider one's own interests, is considerably anaemic in the psychopath. Their impulsivity and narrow attention span gravely diminish their ability to learn from experience. Their impaired capacity of pain-avoidance means that they repeatedly fail to learn the lessons of punishment. Instead of faithfully pursuing their own self-interests, they often act in their own detriment. By favouring immediate pleasure over deferred but longer-lasting success, they fail to follow a coherent life-plan and end up sabotaging themselves. The evidence that psychopaths' decision-making abilities are significantly impaired suggests that their rationality is not as healthy as it first appears.[8]

Before presenting evidence to support the argument thus far briefly formulated it is necessary to explore three main legal theories of culpability, namely retributivism, act-utilitarianism and rule-utilitarianism. Exploration of these theories is necessary at this point because it provides the foundation for the punishment

[7] H.L. Maibom "Moral Unreason: The Case of Psychopathy" 20.2 *Mind & Language* 237-257, at 238.
[8] For further discussion of practical reasoning and psychopathy, see Ibid.

practices of the criminal law. The following discussion will show that two of the three main theories, namely retributivism and rule-utilitarianism, support the view that moral agency is necessary for judgements of accountability. Act-utilitarianism may take a stance of indifference to the existence of moral agency. However, this theory is problematic to support a systematic policy. Arguably, therefore, the law ought to adopt a more accommodating model that accounts for moral agency.

2.2. Legal Conceptions of Accountability

There are a myriad of views examining criminal culpability and its reliance on moral agency. The debate on the preferred interpretation of the application of culpability is, however, bottomless. It is beyond the scope of this dissertation to thoroughly explore the various legal theories of responsibility. Therefore, certain assumptions must be made. Primarily, the retributivist notion that the guilty deserve to be punished is accepted. Considering the social understanding of responsibility, it is fair and safe to assume that guilt is blameworthy. The concept of desert is widespread not merely among lawyers[9] but lay people too. For example, if a student neglects to work throughout the academic semester, parties all night on a regular basis as well as right before an important exam, and fails the exam, most would agree that student deserved to fail to the extent that the student's behaviour indicates some sort of guilt. The idea of desert is so fundamental it is often taken for granted.[10] When people are asked why punish criminals, most would answer that they deserve it because they are guilty. Indeed the retributivist conception of responsibility is a governing theory of penology today, even if other theories are attached to it to enhance it. A conviction of a crime leads to

[9] With the exception of strict-liability offences.
[10] Moral common sense agrees. See J. Rachels *The Elements of Moral Philosophy* (4th ed McGraw-Hill 2003), at 112-113.

punishment. The magnitude of the punishment may depend on utilitarian theories such as incapacitation, but the main rationale for imparting punishment is retributivist.[11] As a rule, the criminal justice system does not punish the innocent.

Since retributivists think the guilty deserve to be punished in proportion to their guilt, their attitude toward punishment depends on one's accountability for criminal behaviour. If it were found that one could not be held accountable because one is not a moral agent, the retributivist would reject the option of punishment as undeserved since lack of moral agency prevents guilt. The retributivist would say that the nine-year-old child should not be punished for homicide because his lack of moral agency precludes his blameworthiness. Likewise, since psychopaths are not moral agents, they cannot be found guilty, and so should not be punished.

Objections to distributing punishment on the basis of guilt are not plentiful. Utilitarians, who justify punishment as an instrument serving the ultimate principle of utility, would not necessarily disagree with guilt being a prerequisite for punishment. A discussion of two main forms of utilitarianism is in order. Utilitarianism as originated by Jeremy Bentham[12] can be characterised as act-utilitarianism. Bentham's principle of utility judged whether an act ought to be done on the consequences of that particular act for the happiness of everyone affected by the act. The act augmenting the happiness of all stakeholders is the one approved by the principle of utility.[13] Sole importance is attached to the consequence of that particular act. Moral norms and rules are merely rules of thumb for the act-utilitarian.[14] Accordingly, an act-

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[11] See Robinson's distinction between determining and limiting principles, in P.H. Robinson "Hybrid Principles for the Distribution of Criminal Sanctions" 82 *NWU L Rev* 19-42, at 29-31.

[12] J. Bentham *Introduction to the Principles of Morals and Legislation* (1789)

[13] See Ibid., chapter 1, at 1-8.

[14] J J.C. Smart "Extreme and Restricted Utilitarianism" 6.25 *Philos Quart* 344-354, at 344.

utilitarian would not object to punishing an innocent or insane man if the consequences of punishing that person were good.[15] For act-utilitarians, therefore moral agency is only relevant if its consequences are positive in a particular instance.

Rule-utilitarianism, on the other hand, is concerned with the consequences of the general acceptance of a system of rules or a practice.[16] The question, therefore, is whether the consequences of rules are good, and not whether the consequences of actions are good. Hence, the choice of morality is one of a rule among rules. The course of conduct chosen in a particular case merely follows a rule. Therefore, when choosing rules of law, responsibility and punishment, one ought to examine whether rational persons would support the consequences of those rules were they generally followed.[17] Accordingly, a rule-utilitarian would ask whether the universalised utility of not restricting punishment to the guilty is positive. Arguably, it is not. If punishment no longer had desert as its foundation, neither would reward. A minimal standard of justice requires that goods are distributed on the basis of merit, rather than arbitrarily. Punishment, as a rule, therefore, ought to be restricted to the guilty. Whether this is a satisfactory theory or not, it is certainly in greater accordance with common sense understanding of moral responsibility than is act-utilitarianism.[18] Furthermore, rule-utilitarianism does not oppose the retributivist requirement of guilt as long as the consequences of doing so are optimal for society. Indeed, moral guilt has indirect social utility, via the social stability that is well preserved by restricting punishment to the guilty. The involvement of the state in the protection of members of society ought to be made for legitimate reasons. In the absence of such

[15] See McCloskey's examples, H J. McCloskey "An Examination of Restricted Utilitarianism" 66.4 *Philos Rev* 466-485 at 468-469; H J. McCloskey "A Non-Utilitarian Approach to Punishment" 8.1 *Inquiry* 249-263 at 255-256.
[16] See discussion of A.K. Stout's distinction between the causal and hypothetical universalisation principle, in Smart "Extreme and Restricted Utilitarianism" at 345-346.
[17] See R.B. Brandt *A Theory of the Good and Right* (Clarendon Press 1979), at 194.
[18] Smart "Extreme and Restricted Utilitarianism" at 348-349.

justifications, appropriating the liberty of individuals who have not broken the law would defile the public conscience. The utility here is in easing the "collective social conscience."[19] Associating criminal liability with moral responsibility justifies state intervention for the protection of the public.[20] Therefore, since psychopathic guilt is prevented by their lack of moral agency, punishing them would not be beneficial to society and should therefore be avoided.

Act-utilitarianism has notorious difficulties and its inferences are problematic.[21] Most penal utilitarians of modern times support deterrence, rehabilitation and incapacitation as rules, rather than individual actions. Supporters of utilitarian theories in penology discuss ideologies,[22] policies,[23] and clusters of dangerous offenders,[24] not individual cases. Act-utilitarianism in penology is not only ethically problematic, but impractical. The criminal law acts as a social order device aimed at informing the public of the legal rules of conduct as well as preventing disorder. Erratic punishment strategies would harm the criminal law's authority. Without delving into the debate, it shall therefore be presumed that guilt is a prerequisite of punishment, without which punishment is unjustified.

2.3. Mental Disorder Defences

In addition to the retributivist and rule-utilitarian restriction of punishment to the guilty, "[o]ur collective conscience does not

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[19] See Arenella "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability", at 1533.
[20] Ibid. at 1533.
[21] See R.B. Brandt "Toward a Credible Form of Utilitarianism" in G. Nakhnikian and H. Castaneda (eds) *Morality and the Language of Conduct* (Wayne State University Press 1963), at 109.
[22] See, for example, F.T. Cullen and K.E. Gilbert "Reaffirming Rehabilitation" in A. von Hirsch and A. Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (2nd edn Hart Publishing 1998).
[23] See D. Beyleved "Deterrence Research and Deterrence Policies" in Ibid.
[24] See J.Q. Wilson "Selective Incapacitation" in Ibid.

allow punishment where it cannot impose blame."[25] The exoneration of the insane is not a modern practice and was jurisprudentially disputed as early as in the thirteenth century.[26] Bracton, in his treatise on the laws and customs of England[27], wrote of the leniency towards the madman, saying that his acts are shielded by their misfortune.[28] The criminality of insane conduct is diminished as a result of missing intent.[29] The implication is that insanity signifies a total lack of freewill.[30]

The two defences recognising the effect that disorders of mind may have on moral agency and therefore legal culpability are insanity[31] and diminished responsibility.[32] The insanity defence is a complete defence affecting an accused who, at the time of the offence, was suffering from a defect of reason from a disease of the mind. This disease of the mind must cause the accused to not know the nature and quality of the act he was doing, or if he did know, to not know that what he was doing was wrong. If the defence succeeds in demonstrating this, the accused would be found not guilty by reason of insanity. As construed by the courts, the insanity defence does not negate the guilt of those suffering from the disorder of psychopathy. This is partly due to the courts' narrow construction of knowledge of the nature and quality of the act or knowledge that the act is wrong. An interpretation that accounts for psychological knowledge would necessarily be wider and thus include the effects of the disorder of psychopathy on an actor. The construction of

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[25] *Holloway v U.S.* (1945) 148 F.2d 665, at 666-667, per Arnold, Associate Justice.
[26] For a history of the defence, see N. Walker *Crime and Insanity in England: Volume I: The Historical Perspective* (Edinburgh University Press 1968); J. Robitscher and A.K. Haynes "In Defence of the Insanity Defence" 31.*Emory LJ* 9-60.
[27] H.D. Bracton *De Legibus et Consuetudinibus Angliae* (Harvard University Press 1968-1977).
[28] Original – 'infelicitas', translated as 'ill-luck' or misfortune.
[29] See Walker *Crime and Insanity in England: Volume I: The Historical Perspective*, chapter 1: "Saxons and Normans", at 26.
[30] M. Hale *Historia Placitorum Coronae / The History of the Pleas of the Crown* (Nutt, E. and Gosling, R. 1736), "where there is a total defect of the understanding, there is no free act of the will".
[31] According to the case of *M'Naghten* (1843) 10 Cl & Fin 200
[32] Homicide Act 1957, section 2.

this defence provides a perfect example for the law's outdated view of moral agency. A more enlightened view claims that the requisites for moral agency are not merely cognitive but also affective. Indeed the defence of diminished responsibility provides evidence, albeit limited, that the law recognises the need for a wider construction of mental disorder as affecting moral agency. Diminished responsibility affects an accused charged with murder whose abnormality of mind substantially impaired his mental responsibility for his acts in committing the killing. The effect of this defence is to reduce the charge of murder to that of manslaughter. The phrasing of the defence plainly encompasses the disorder of psychopathy in the expression 'abnormality of mind'. It allows an accused charged with murder to present evidence of how psychopathy impaired his mental agency so as to weaken his culpability for the crime of murder. This is, therefore, evidence that the law philosophically acknowledges that psychopathy might damage moral agency. Before exploring these defences at greater length, however, legal theories of excuse ought to be briefly discussed.

In the realm of defences, two theories explaining legal excuses have surfaced, namely the choice theory of excuse and the character theory of excuse.[33] The following discussion shall demonstrate the subordinacy of the choice theory of excuse. A theory of defences focusing on choice inadequately accounts for moral agency. The choice theory emphasises rational choice, while disregarding affective features influencing choice. However, an expansive account of the character theory of excuse is not advocated here either. The character theory has critical weaknesses where it judges an actor for his bad character.[34] This aspect of the theory is not endorsed here. Rather, it is proposed that an authoritative theory of

[33] See M.S. Moore "Choice, Character, and Excuse" in E.F. Paul, Miller, F.D., Paul, J. (ed) *Crime, Culpability, and Remedy* (Blackwell 1990).
[34] Ibid. at 39-40.

legal excuses accounts for both cognitive and affective factors influencing choice of conduct.

A word about terminology. A distinction is made here between cognitive and affective qualities. Cognitive qualities connote a capacity for rationality. They refer to those mental processes such as thought, perception, and reasoning that facilitate learning and acquiring knowledge. Cognitive capacities enable us to perceive reality and discern our place within it. Affective qualities, on the other hand, signify emotional capacities that are associated with ideas and have a motivational quality. The capacity for empathy is one such affective faculty. Empathy enables us to go beyond reason into an imaginative and emotive understanding of others' experiences. The choice theory of excuse focuses on cognition to the exclusion of affect. Given that the law transcends choice and considers character in its disordered disposition when it affects cognition,[35] there is no principle preventing the law from considering other defects of mind, such as psychopathy, as an excuse.

The choice theory of excuse offers a defence if the offender lacked opportunity to obey the law.[36] The emphasis is on the act rather than the actor. When an actor has fair opportunity to obey the law and chooses not to, blaming him for his transgression is fair and justified. Bad choices are only excused when the actual choice was restricted by inadequate opportunity. The choice theory of excuse is a personification of a more comprehensive theory of responsibility that explains moral agency and behaviour by focusing on cognitive faculties. This account of moral agency fails for ignoring those

[35] Namely the insanity defence.
[36] Moore "Choice, Character, and Excuse" at 29.

"special attributes an individual needs to understand and use moral norms as a reason for his action."[37]

Regrettably, the criminal law traditionally adheres to the choice theory of excuse and confers a defence only to individuals whose actions were taken while they did not have the sufficient opportunity to make the choice to conform to the law's requirements. The difficulty of this theory is the disregard any elements of character beyond the cognitive capacity of the actor. In the majority of criminal law excuses, the bad acts of people are excused when the reasonable person in their situation would have acted similarly. Both self-defence and the defence of provocation consider how the reasonable person would have reacted in the position of the defendant. According to the law on self-defence, "a person may use such force as is reasonable in the circumstances in the prevention of crime."[38] Therefore a minor assault met with a counter-assault using a knife or gun would not be considered reasonable, and thus not justified. The law on provocation requires not only that the actor prove he lost his self-control as a result of provocation, but also that a reasonable man would have done as he did.[39] Thus, if a reasonable man would not have stabbed the victim in his sleep as a result of an earlier substantiated violent threat, the actor would not be excused.[40] These 'reasonable person' defences give little attention to those character traits of the defendant that perhaps instigated or triggered his or her aggressive reaction.

One of the only moral character excuses of the criminal law is the defence of insanity. Depending on the severity and effect of the mental disorder involved, the insanity defence can either negate

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[37] P. Arenella "Character, Choice and Moral Agency: The Relevance of Character to out Moral Culpability Judgments" in E.F. Paul, F.D. Miller and J. Paul (eds) Ibid., at 60-61.

[38] Criminal Law Act 1967, Section 3.

[39] Homicide Act, Section 3.

[40] See especially cases of battered women who killed their husbands, such as *R v Thornton (No.2)* (1996) 2 All ER 1023 and *R v Ahluwalia* (1992) 4 All ER 889.

moral agency of the actor or excuse the act itself. The actor may suffer from such a specific mental disability as to negate his responsibility vis-à-vis the particular conduct concerned, for instance a delusional schizophrenic who believes he is persecuted by the devil, may lack moral agency due to his distorted view of reality. Deriving from Aristotle's conception of responsibility, the insanity defence focuses almost wholly on the cognitive faculties of the person. Presuming sanity, absence of the requisite degree of reason must be established. It must be shown that the accused was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[41]

The M'Naghten rules, however, have been the subject of intense criticism almost since they were conceived. This criticism can be separated into three points, the first focusing on the narrowness of the concept of mental disorder, the second relating to the restricted view of knowledge of the nature and quality the act, and the third, to the limited view of knowledge of the wrongfulness of the act.

The narrowness of the concept of mental disorder was set in motion when the House of Lords referred to a disease of the mind causing a defect of reason. The restriction of the defence to defect of reason means that mental disorders causing defect other than of reason are excluded from the scope of the defence. This is doubtless derived from a vision of reason as the single most important quality responsible for moral agency. This test was, however, devised in the first half of the nineteenth century and was therefore heavily influenced by philosophy of the enlightenment. The enlightenment's age of reason, emphasising rationality, logic, and science, maintained its influence on the law well into the twentieth century. Indeed, despite the fact that classical

[41] *M'Naghten* per Lord Tindal, C J.

philosophers such as Plato,[42] Spinoza,[43] and Hume[44] recognised in their time the relevance of emotion to motivating behaviour, most of the twentieth century philosophy of mind, psychology, and law, appeared to devote little attention to the emotions. Recently, however, philosophical and psychological attention to the emotions has grown.[45] There is also growing support for the contention that cognition is not alone in its importance for moral agency.[46]

Recent advances in psychology have emphasised the role of emotions in mental disorder. Until recently, the preponderance of psychological theories made little application of theories of emotions to mental disorder.[47] However, there is now an increasing amount of research on disordered emotions in mental disorders. This new awareness does not focus only on those mental disorders that are more noticeably emotive in their maladjustment, such as bipolar disorder, but also on disorders that until recently were thought to be cognitive. The majority of the literature on schizophrenia, for example, has focused on cognitive defects, such as disorganised speech, hallucinations, and delusions.[48] However, schizophrenics suffer from emotional as well as cognitive dysfunction. Anhedonia, the inability to gain pleasure from

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[42] See Plato *The Republic*, where one of the three basic components of the mind is said to be the emotions.

[43] For whom emotions differentiate between the best and the worst lives. See B. Spinoza *Ethics* (Hackett 1995).

[44] D. Hume *A Treatise of Human Nature* (OUP 2000), argued that reason is and ought to be the slave of the passions.

[45] See, for example, Hoffman *Empathy and Moral Development: Implications for Caring and Justice*; Goleman *Emotional Intelligence: Why It Can Matter More than IQ*; M.C. Nussbaum *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press 1994); M.C. Nussbaum *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2001); P. Goldie *The Emotions: A Philosophical Exploration* (Clarendon Press 2000).

[46] See discussion below.

[47] See M J. Power and T. Dalgleish *Cognition Emotion: From Order to Disorder* (Erlbaum 1997), at 148.

[48] See Association *Diagnostic and Statistical Manual of Mental Disorders*, code number 295; S. Mohamed *et al.*, "Generalized Cognitive Deficits in Schizophrenia: A Study of First-Episode Patients" 56.8 *Arch Gen Psychiat* 749-754; A.L. Hoff *et al.*, "Lack of Association Between Duration of Untreated Illness and Severity of Cognitive and Structural Brain Deficits at the First Episode of Schizophrenia" 157.11 *Am J Psychiat* 1824-1828.

normally pleasurable experiences, is frequently reported by persons suffering from schizophrenia.[49] Complaints of affective blunting are also typical of patients suffering from schizophrenia.[50] Indeed some have suggested that anhedonia could possibly be a principal cause of schizophrenia.[51] Regardless of the causes of the disease, there are manifest affective deficiencies that have been overlooked and under-researched.[52]

The law's unreasonable focus on cognition emanates from this misrepresentation. Therefore, this new recognition of the importance of affective deficiencies in a mental disease should support reform of the M'Naghten rules. A new definition of mental disorder should be devised to include affective defects of mind. Such construction is liable to recognize psychopathy as such an affective disorder.

The second objection to the M'Naghten rule concerns the restricted reading of knowledge.[53] In order to prove insanity, the accused must prove he did not know the nature or quality of the act. The courts have construed 'knowledge' narrowly as a rather superficial cognitive function. Consider the mother who drowns her children, killing them, believing she was saving them from the devil that has possessed her.[54] This woman knows she is physically taking the lives of her children, but whether she has a logical, lucid understanding of her actions and their consequences is doubtful. Most likely it is

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[49] See G. Loas *et al.,* "Anhedonia in the Deficit Syndrome of Schizophrenia" 32 *Psychopathology* 207-219.
[50] See L. Sweet "Dissociation of Affect Recognition and Mood State from Blunting in Patients with Schizophrenia" 81.3 *Psychiatry Res.* 301-308.
[51] P.E. Meehl "Schizotaxia, Schizotypy, Schizophrenia" 17 *Am. Psychol.* 827-838, at 829, 832-833.
[52] For general discussion of the affective aspects of schizophrenia, see R.P. Bentall "Madness and Emotion" in R.P. Bentall (ed) *Madness Explained: Psychosis and Human Nature* (Allen Lane 2003).
[53] See R. Kuh "The Insanity Defence – An Effort to Combine Law and Reason" 110.6 *U Penn Law Rev* 784-815, at 782-783.
[54] These facts resemble those of the American case of Andrea Yates Court TV "Jurors: Yates' Drowning of Her Children Seemed Premeditated" (2002) <http://www.courttv.com/trials/yates/031802-b_ap.html>

Most likely it is her mental illness[55] that has warped her grasp of the situation so much as to contradict a genuine understanding of her actions. The prevalent interpretation of the M'Naghten test may view this woman to have had sufficient knowledge for legal sanity, as she literally knew she was killing her children. This interpretation, however, despite being literal, is absurd. Knowledge should signify the capacity of the accused "to evaluate his actions, including his reasons or motives for committing them and the consequences normally associated with them, in the way that a sane person can."[56] She may have known she was taking the lives of her children, but she equally knew that she was saving them from eternal hell. These two pieces of knowledge do not correspond well. The law's choice to emphasise one rather than the other is arbitrary.

The psychological make-up of the psychopath provides support for this analysis. The psychopath, despite being able to literally understand the nature of his conduct, is incapable of appraising his behaviour in a more profound way. He cannot be said to understand the moral nature of his behaviour and the consequences of his behaviour that go beyond the immediate results. The psychopath, in place of the mother, would understand he is killing the children in a narrow meaning of the word. He may know that society views his conduct as morally wrong but the recognition would have no psychological weight. His knowledge is purely intellectual. The moral norms that poison the killing of children are as meaningless to the psychopath as they are to the psychotic mother. The psychopath is insensitive and unresponsive to moral norms, for he lacks those elements of the personality that enable adequate consideration of morality. Recognising only the momentary and superficial qualities of his conduct, the psychopath

[55] In the case of Andrea Yates, postnatal depression and psychotic illness, possibly schizophrenia. See Dr. Resnick's testimony. See F. Charatan *et al.*, "Woman May Face Death Penalty in Postnatal Depression Case" 324.7338 *BMJ* 634.

[56] F. McAuley *Insanity, Psychiatry and Criminal Responsibility* (Round Hall 1993), at 30.

clearly fails to have a genuine knowledge of the nature of his conduct. The law, however, does not recognise that, and chooses to ignore the extent of the psychopathic maladjustment and its effect on knowledge of morality.

Psychopaths may have an intellectual understanding of our moral norms,[57] but they fail to grasp the meaning we attach to these norms. Without such appreciation, the distinction between right and wrong is of no real significance, and is merely analogous to features of etiquette. Knowledge implies understanding, which in turn implies comprehension, which is a profound process.[58] Construed this way, it is clear that psychopaths fail to satisfy this specification. It is therefore asserted that the law ought to consider severe affective deficiencies in a way that corresponds to its consideration of cognitive disabilities. The law should therefore follow modern knowledge and recognise the affective element of knowledge in its construction of the insanity defence.

The third criticism of the M'Naghten rules challenges the limited view of wrongfulness. The knowledge of wrongness of conduct has been interpreted narrowly to signify knowledge of law only. Under M'Naghten, wrongness does not have moral connotations and is restricted to knowledge of the decrees of the laws of the land. Hence if the mother mentioned above, despite being mentally ill, knows that the law prohibits her killing her children, she shall be deemed responsible. This conclusion makes little sense considering her conviction that she is saving her children from the devil. Morally, she is doing good. The psychopath differs from the mother in one sense. Like the mother, he knows that killing people is illegal, but, unlike the mother, his unresponsiveness to the rule of

[57] See Arenella "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability", and clinical description of psychopathy in previous chapter, regarding abstract language understanding deficiencies in psychopaths.

[58] See definition of 'understanding', Dictionary of Psychology, at 824.

law is not due to a stronger moral judge; rather it is impulsive and lacking in moral reasoning. The mother knows the law prohibits what she's doing but also knows that something bigger than that, a deity, would approve of her conduct. Under this construction, it is questionable whether there is a single mental disorder that prevents one from knowing one's acts are illegal.[59] There is, however, a mental disorder that prevents one from knowing one's acts are immoral and that disorder is psychopathy. The psychopath knows the law forbids killing, but this prohibition lacks meaning. The same goes to moral laws – they lack meaning. The only motive for his behaviour comes from impulses. His short attention span seeks momentary pleasure.

Consider the following. On the way to a party, a young man decides to buy a case of beer. Having realised he had left his money at home, he robs a nearby petrol station, injuring an employee.[60] This man knows his conduct is illegal, but he is unresponsive to these reasons, and neither is he responsive to moral reason. The only thing he is responsive to is his immediate need for cash. He knows the law prohibits robbery and assault, but this knowledge is merely intellectual. Furthermore, his incompetence extends to his own interests. The typical imprudence of the psychopath means that he consistently fails to consider not only the long-term consequences of his actions, but the immediate ones. And so, the prospects of being arrested or imprisoned are unlikely to even enter his mind before acting. Even if he has been incarcerated before, he would not be perturbed by these prospects.

A broader sense of wrongfulness would better reflect both the motivations of healthy individuals for abiding by moral and legal

[59] See S. Gendin "Insanity and Criminal Responsibility" 10.2 *Am Philos Quart* 99-110, at 102.
[60] Hare *Without Conscience*, at 58-59.

rule and the weakened motivations of the mentally disordered.[61] Preferably, the test for the insanity defence would construe knowledge of wrongfulness of conduct to encompass a comprehension of immorality of conduct that is both cognitive and affective.

Despite some theorists arguing against the inclusion of psychopathy in the insanity defence,[62] psychopaths simply lack capacities that are essential for moral agency. Discounting their incapacities does not make them moral agents.[63] It is important to bear in mind that expanding the insanity defence "does not seek to diminish human dignity; rather, it simply endeavours to acknowledge reality by recognizing that individuals do not share the same capacities and abilities."[64] Furthermore, excluding psychopaths from the insanity defence, for example because they are difficult to manage, is fallacious.[65] Current and future research may offer reason for optimism in relation to the treatability of psychopath.[66] In the interim psychopaths are excluded from the insanity defence. They are not excluded, however, from the defence of diminished responsibility.

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[61] See L. Reider "Toward a New Test for the Insanity Defence: Incorporating the Discoveries of Neuroscience Into Moral and Legal Theories" 46.1 *UCLA L Rev* 289-341, especially 322-324. Reider argues that moral agency and the insanity defence must regard a richer conception of rationality that includes emotional capacities that the psychopath lacks.

[62] See, for example Scottish Law Commission *Discussion Paper on Insanity and Diminished Responsibility* (122 2003), at 23-24.

[63] Stephen Morse, who usually argues against expanding the defence of insanity, affirmed that "On many occasions the defendant should be excused because... lacked some other attribute, such as the capacities for empathy and guilt, that make it hard to fly straight and thus should be included in a just account of responsibility." See S J. Morse "Culpability and Control" 142.*U Penn Law Rev* 1587-1660, at 1660. See also S J. Morse "The Twilight of Welfare Criminology: A Reply to Judge Bazelon" 49.5 *S Cal L Rev* 1247-1268, at 1267, where he refers to the danger to public order and disrespect to personal dignity.

[64] Reider "Toward a New Test for the Insanity Defence: Incorporating the Discoveries of Neuroscience Into Moral and Legal Theories", at 341.

[65] See Kuh "The Insanity Defence – An Effort to Combine Law and Reason", at 799-800.

[66] For more on the treatability of psychopaths, see chapter on mental health management.

Diminished responsibility was introduced to English law in 1957 in response to the narrowness of the insanity defence as well as the existence of the death penalty as a mandatory sentence for murder.[67] This defence seems to provide an opening wherein psychopaths may find a partial excuse to the crime of murder.[68] Diminished responsibility acts to reduce murder to manslaughter[69] if the accused "was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing."[70] Thus what is required is an abnormality of mind that significantly diminished mental responsibility for the homicide. Compared to the insanity defence, diminished responsibility is both wider and narrower. It is wider in its application to a range of mental disorder and narrower in its exemption from legal responsibility than the insanity defence. 'Abnormality of mind' has been defined to mean "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal."[71] Visibly wider than 'defect of reason', it incorporates such defects affecting the ability to exercise control over one's behaviour[72] and is thus wide enough to cover affective disorder and cognitive disorders falling short of the insanity defence. Thus psychopathy is recognised by the defence as a disorder diminishing responsibility. This provides evidence, therefore, that the law, albeit partially, acknowledges that psychopaths are not full moral agents. The philosophical rationale behind diminished responsibility is that certain mental disorders weaken moral agency so critically that to hold them fully

[67] In Homicide Act, section 2 (1). The English defence is based on the Scottish common law defence of diminished responsibility introduced in *HM Advocate v Dingwall* (1867) 5 Irvine 446. For discussion, see *Discussion Paper on Insanity and Diminished Responsibility*, specifically part 3, at 33-44.
[68] For discussion of the diminished responsibility defence and psychopaths, see Wootton "Diminished Responsibility: A Layman's View".
[69] Hence it is also known as 'section 2 manslaughter'.
[70] Homicide Act, section 2(1).
[71] *R v Byrne* (1960) 2 Q.B. 396, per Lord Parker CJ, at 403.
[72] See Lord Parker CJ in Ibid., at 403.

blameworthy is unjust. Psychopathy is such a disorder. Some of the attributes of the disorder mean that individual sufferers lack the capacity to comprehend the wrongfulness of the behaviour. They lack the capacity to be motivated by moral reasons. They lack the capacity to be deterred and persuaded by punishment. To hold psychopaths equally responsible is to remove the concept of legal culpability from the reality of moral capacity to conform to the law's demands. Recognising psychopathy as a disorder significantly diminishing responsibility suggests an understanding of moral agency that is more faithful to psychological knowledge. Regrettably, the defence of diminished responsibility is merely a partial defence that limited to a charge of murder. It does not go as far as to recognise that psychopathy may diminish responsibility. It does, however, provide legal recognition of the effects of the disorder on moral agency. This partial recognition of psychopathy ought to be extended to a full defence to all offences, namely the insanity defence.

Since the law generally emulates social and scientific change, philosophical and psychological theories of moral agency shall be discussed. These shall confirm that certain affective capacities absent in the psychopath are requisites for moral agency. Both philosophical and psychological theories corroborate the contention made here that psychopaths lack moral agency. Accordingly, it is proposed, the law ought to follow suit and acknowledge more fully the lack of moral agency of the psychopath and recognise that holding psychopaths accountable for their criminal behaviour is unjustified.

2.4. Reason and Sentiment in the Philosophy of Moral Agency

"When I rob a bank," he said, "I notice that the teller shakes or becomes tongue-tied. One barfed all over the money. She must have been pretty messed up inside, but I don't know why."[73]

The affective deficiencies of the psychopath negate their status as moral agents. This judgment is based on a model of moral agency which deems affective capacities as essential, albeit insufficient. In order to demonstrate this and to present a model of moral agency that may help enrich the law's vision of culpability, a review of the philosophical debate on the roles of reason and sentiment in moral agency shall ensue. Essentially, the debate questions whether it is sentiment or reason that is the prominent drive of morality and agency. The majority of theorists acknowledge that both reason and sentiments have some value for moral agency. The disagreement rests on which of the two is the driver and which is the passenger. The discussion shall focus on two main philosophies, launched by David Hume and Immanuel Kant.[74] Hume is known for saying that reason could never have a motivational influence on action; rather it is the passions that motivate action.[75] Kant acceded that emotional factors have influence on behaviour,[76] but argued that morally worthy conduct is conduct motivated solely by reason and duty.[77] The dominating view in moral philosophy for many years

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[73] A psychopath, Hare *Without Conscience*, at 53-54.

[74] This debate arises from each of these philosophers' writings, not from a discussion in person. In fact, as shall be shown, the debate cannot be construed as a complete conflict, as these philosopher's assumptions and aims are distinct. A discussion of their different ethical theories, however, is valuable here. Indeed Kant (1724-1804) responded to arguments made by Hume (1711-1776) a quarter of a century earlier.

[75] Hume *A Treatise of Human Nature*, Book II, Part III, §3: "Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."

[76] I. Kant *The Doctrine of Virtue: Part II of the Metaphysic of Morals* (University of Pennsylvania Press 1964) at 60: "every man has them and it is by virtue of them that he can be obligated"... "No man is entirely without moral feeling, for were he lacking in capacity for it, he would be morally dead."

[77] I. Kant *Groundwork of the Metaphysics of Morals* (Harper Torchbooks 1964), 61-69.

seemed to be rationalism.[78] Ethical theories based on Hume's ideas, often referred to as meta-ethical sentimentalism, have been endorsed less frequently. Recently, however, more work has been done supporting Hume's view of emotions as motivations for moral conduct.[79] The view presented here partly supports both philosophies; a view negating psychopaths' moral agency. The psychopath lacks those basic emotional capacities that, according to Kant are necessary for being human,[80] and according to Hume, motivate moral behaviour. The following discussion shows that according to both rationalists and sentimentalists, the psychopath could not be considered a full moral agent.

Rationalists maintain that humans are rational beings capable of rational analysis and decision-making.[81] By virtue of this, rational beings act morally when they act out of duty. The Kantian categorical imperative by which all rational beings are bound, the formula of universal law, requires one to act only on principle that one can also will to become a universal law.[82] Furthermore, one is required to treat other rational beings as ends in themselves, rather than as means to ends.[83] Since rational beings are valuable in themselves, rather than conditional upon the ends they achieve, they are ends in themselves. So long as we focus on reason

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[78] See, for example, T. Nagel *The Possibility of Altruism* (Princeton University Press 1978); J. Rawls *Theory of Justice* (Revised OUP 1999); A. Gewirth *Reason and Morality* (University of Chicago Press 1978); S.L. Darwall "A Defence of the Kantian Interpretation" 86.2 *Ethics* 164-170; P. Singer *How Are We to Live?: Ethics in an Age of Self-Interest* (Prometheus Books 1995); M. Smith *The Moral Problem (Philosophical Theory)* (Blackwell Publishers 1994).

[79] See for example M. Slote "Sentimentalist Virtue and Moral Judgement" 34.1/2 *Metaphilosophy* 131-143; B.W. Helm "Emotion and Practical Reason: Rethinking Evaluation and Motivation" 35.2 *Nous* 190-213; Kennett "Autism, Empathy, and Moral Agency".

[80] Kant *The Doctrine of Virtue: Part II of the Metaphysic of Morals* at 60: "And if (to speak in medical terms) the moral life-force could no longer excite this feeling, then humanity would dissolve (by chemical laws, as it were) into mere animality and be mixed irrevocably with the mass of other natural beings."

[81] See the whole text of Kant *Groundwork of the Metaphysics of Morals*, and for example, at 79: "Since moral laws have to hold for every rational being as such, we ought rather to derive our principles from the general concept of a rational being as such, and on this basis to expound the whole of ethics."

[82] Ibid., at 71, 88-89.

[83] This is known as the formula of end in itself. Ibid., at 95-98.

psychopaths may appear initially to satisfy this conception of moral agency. Superficially, psychopaths may appear to possess capacities for rationality and are therefore often viewed as moral agents. There are two ways to respond to this. First would be to say that the rational model of moral agency is an incomplete account of agency that disregards important emotional qualities that are essential for agency.[84] Alternatively, since the psychopath is a man who altogether lacks moral feeling, he may simply be seen as morally dead.[85]

It has been said that a man without conscience could not conceive of the duty of having a conscience.[86] This man "would neither put anything to his credit as in accordance with duty nor reproach himself with anything as contrary to duty."[87] Thus, a man with no conscience would be blind to duty, rather than choose to ignore it. The psychopath, being such a man, is indeed blind to duty. He does not choose to reject duty; he simply does not possess the mechanism for considering it. Possessing a conscience causes one to be inhibited by internal factors, such as anxiety and fear, and external factors, such as the punishment practices of parents and legal systems. The psychopath, who lacks both external and internal inhibitors, is motivated by neither. He is not a moral person. Indeed one journal editor decided to reject a paper dealing with the electrical brain activity in psychopaths following a language task due to finding "some of the brain pattern depicted in the paper very odd ... could not have come from real people."[88]

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[84] See W. Glannon "Psychopathy and Responsibility" 14.3 *Int J Applied Phil* 263-275, at 264.
[85] Kant *The Doctrine of Virtue: Part II of the Metaphysic of Morals*, at 60. See also Murphy "Moral Death: A Kantian Essay on Psychopathy".
[86] Kant *The Doctrine of Virtue: Part II of the Metaphysic of Morals*, at 61.
[87] Ibid., at 61.
[88] See Hare *Without Conscience*, at 1.

Not only do psychopaths have shallow levels of anxiety and fear,[89] they also fail to respond to expressions of anxiety and fear in others.[90] They suffer no psychological distress themselves and fail to recognise such distress in others. In non-psychopaths the wish to offend is often accompanied by anxiety regarding being caught or fear of failure. The psychopath feels neither. In situations where most individuals would feel scared or anxious, the psychopath remains calm. While a non-psychopath would feel discomfort watching another suffer, the psychopath does not. Accordingly, the foundation essential for perceiving duty is absent. The psychopath is blind to duty like some are blind to colour. The psychopathic blindness extends to external demands, such as social rules.

Being a member of society is one of the reasons one is bound by law.[91] The law has no force in the absence of society. Unfortunately, for the psychopath society is merely an intellectual idea, a fiction. Being an island unto himself,[92] he is not truly a member of society. He sees other people as objects, as means to his ends, rather than as people, ends in themselves. He is thus an alien, both socially and morally. Like an animal, the psychopath is not a rational being,[93] and thus not a moral agent.

Reason alone does not motivate action,[94] as it is "not contrary to reason to prefer the destruction of the world to the scratching of my finger."[95] Abstract logic demonstrates the truth or falsehood of

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[89] Patrick *et al.*, "Emotion in the Criminal Psychopath: Startle Reflex Modulation"; R.D. Hare *et al.*, "Psychopathy and Physiological Responses to Threat of an Aversive Stimulus" 15.2 *Psychophysiology* 165-172
[90] R J.R. Blair *et al.*, "Turning a Deaf Ear to Fear: Impaired Recognition of Vocal Affect in Psychopathic Individuals" 111.4 *J. Abnorm. Psychol.* 682-686.
[91] See Murphy "Moral Death: A Kantian Essay on Psychopathy", at 290-291.
[92] See Donne "Devotions upon Emergent Occasions – Meditation XVII".
[93] See Murphy "Moral Death: A Kantian Essay on Psychopathy". For discussions of psychopathy and practical reason, see J. Deigh "Empathy and Universalization" 105.4 *Ethics* 745-763; Glannon "Psychopathy and Responsibility"; P. Litton "Moral Capacities and Practical Rationality" (*Conference on Value Inquiry: Crime, Punishment, and Responsibility* 2001).
[94] Hume *A Treatise of Human Nature* Vol. II, Bk II, Pt III, Sect III.
[95] Ibid. Vol. II, Bk II, Pt III, Sect III.

things; it does not move us to act.[96] The motives for actions originate from our passions, tastes, urges and the like, whereas reason merely attempts to regulate. The answer to the question 'why be moral' can only come from within, from an internal and passionate drive to be moral. It is only after we are moved to be moral that we ask for the most moral course of action.

It is the capacity for empathy, absent in the psychopath, that helps motivate moral behaviour. Indeed, "morality without empathy is by definition oxymoronic."[97] The word 'empathy', first developed in the late 1800's, was coined by the American psychologist, Edward Titchener, translating the German 'einfühlung', which literally means 'to feel as one with'.[98] It is a communication device, facilitating one to feel pity and terror at the prospect of another going through pain or suffering.[99] Empathy is an especially potent force capable of shaping one's moral sentiments.[100] These sentiments may later produce the more artificial virtues, such as the sense of justice. Empathy, therefore, is a predisposition out of which emerge qualities that society approves of and sees as desirable.

The objectionable qualities of the psychopath originate from an underlying absence of a capacity for empathy. His incapacity to feel empathy prevents him from developing moral qualities. The possession of the natural virtue of empathy exhibits itself in every

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[96] Ibid. Vol. II, Bk II, Pt III, Sect III.
[97] U. Goodenough and T.W. Deacong "From Biology to Consciousness to Morality" 38.4 *Zygon* 801-819, at 815.
[98] By Robert Vischer in Das optische Formgefühl. See Electronic Text Centre at the University of Virginia Library "The Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas" <http://etext.virginia.edu/DicHist/dict.html>
[99] See Hume *A Treatise of Human Nature* Vol. II, Bk III, Pt III, Sect I. Hume refers to sympathy, not empathy, but his definition of that term is identical to the modern meaning of empathy. See R. Norman "Hume: Sympathy" in R. Norman (ed) *The Moral Philosophers – An Introduction to Ethics* (2nd edn OUP 1998), at 53-54.
[100] See Hume *A Treatise of Human Nature*, Vol. II, Bk III, Pt III, Sect I; Norman "Hume: Sympathy", at 55.

act.[101] A thorough investigation of a person's behavioural patterns should enable one to judge whether they possess the capacity for empathy. Comprehensive observations of psychopaths suggest that psychopaths lack the natural virtue. Their sporadic acts of sociability are arbitrary. Sometimes, at irregular intervals, the psychopath would do something nice, obey the rules, and follow conventions. However, these affable acts are rare and fleeting. A complete account of the life of the psychopath would show that these achievements are merely transient. The pattern is one of dishonest, reckless, and immature behaviour.[102] Neuropsychological and brain imaging studies support the allegation that the psychopath lacks these natural abilities.[103]

What this discussion succeeded in showing is that both rationalist and sentimentalist models would not consider the psychopath a moral agent. Psychopaths lack the capacity to contemplate duty, as well as the ability to feel empathy, both of which are essential for moral agency. Without them, one is morally dead. Hence, the psychopath, as non-moral agent, cannot be held blameworthy for not acting in accordance with duty.

Psychological theories on the development of moral agency concur with this philosophical analysis. The psychological understanding of the conscience shall be explored. The healthy development of conscience is vital for moral agency, and, bearing in mind its absence in the psychopath, its psychological nucleus ought to be explored. Rationalistic models of moral developmental shall also be discussed. Together, these theories make the case that certain mature emotions are necessary in the development of moral

[101] Hume *A Treatise of Human Nature*, Vol. II, Bk III, Pt III, Sect I.
[102] See Cleckley *The Mask of Sanity* at 340-341.
[103] Intrator *et al.*, "A Brain Imaging (Single Photon Emission Computerised Tomography) Study of Semantic and Affective Processing in Psychopaths"; Kiehl *et al.*, "Semantic and Affective Processing in Psychopaths: An Event-Related Potential (ERP) Study"; Patrick *et al.*, "Emotion in the Criminal Psychopath: Startle Reflex Modulation"; R J.R. Blair "Neurobiological Basis of Psychopathy" 182 *Brit J Psychiat* 5-7.

character and agency. They support the argument made in this dissertation that the psychopath, lacking those capacities, is not a moral agent.

2.5. Development of Moral Agency

The psychological study of moral agency has proved enlightening in unearthing the processes underlying moral development and the qualities that are essential for the development of moral agency. Like all psychological theories, the main theories of morality have been heavily influenced by Freud's conceptions. Some theorists chose a different path, criticising Freud's ideas as unfounded, while others followed Freud's route. It is thus worthwhile to begin by exploring Freud's theory of personality.[104] Freud's theory explains the personality on the basis of three internal elements. The balance struck between these forces and the way they interact influence the personality of the individual. Furthermore, for a healthy personality to develop, a harmonious relationship between these internal forces is necessary. The development of the conscience is also reliant on the balance of these forces, and so in order to become a moral agent, one's internal forces should be healthily balanced. Freud's theory emphasised moral affect. Since affect in the psychopath is superficial if it exists at all, moral agency is thus frustrated. A brief description of Freud's tripartite personality shall be made, along with an examination of the conscience.

Freud divided the person into three main parts, the *id*, the *ego*, and the *superego*. The *id* is the primitive part of the psyche, residing within the unconscious, with which all are born. It is driven by primal instincts and is anchored in the pleasure principle. It is therefore the ultimate hedonist. The *id* does not care for rationality,

[104] Freud's theory is somewhat similar to Plato tripartite model of the soul. See Kenny "Mental Health in Plato's Republic" for a discussion of Plato's tripartite soul and Freud's tripartite personality.

morality or the needs of others; rather it heeds only its own satisfaction. The *ego* is based on the reality principle and signifies the realisation that one is an individual with one's own needs and wants. This sense of identity or self grows to partially control the *id*, as it functions as a mediator between the *id* and reality. Lastly, the *superego* represents the internalisation of external rules. It functions as the conscience. The *superego* comprises of the conscience and the *ego ideal*, which punish and reward the individual, respectively. The process of acquiring the conscience occurs at a time when the child first experiences the practical separation from the parents and the incorporation of a new set of adult rules, in the form of teachers and other authority figures. Trauma and other adverse influences at this stage may interrupt the development of the conscience.[105]

A healthy harmony of all three would exhibit itself in the following example. When faced with a pretty object of one's fancy, the *id* may prompt one to simply take that object to take pleasure in. The *superego* would thus attempt to prevent this behaviour, applying society's disapproval of taking without permission. The *ego* would attempt to gratify both by finding a compromise, through, for example, the purchasing of the object of fancy. The strength of the *ego* is seen as an indication of mental health.

Psychopaths seem to suffer from an arrested development of the *ego*, leaving the *id* inappropriately restrained.[106] Psychopaths appear to be the epitome of the unrestrained *id*, closely abiding by their whims and instincts with no thought for others and their interests, society and its norms. They may not enjoy the punishment conferred on them, but they fail to learn from it, continuing to follow their *id*'s desires. For moral agency to develop, the *id* must

[105] See P. Greenacre "Conscience in the Psychopath" in R J. Meloy (ed) *The Mark of Cain* (The Analytic Press 2001), specifically referring to those psychopaths seen in private practice; G.M. Stephenson *The Development of Conscience* (Routledge 1966).

[106] P. Cramer "Personality, Personality Disorders, and Defence Mechanisms" 67.3 *J. Pers.* 535-554.

be controlled by a healthy conscience. Since the conscience is inactive in the psychopath, the *id* remains unrestrained. The psychopath remains, therefore, like a wild animal, not a moral person.

Other theories of moral development emphasise the cognitive processes of moral decision-making and may regard psychopaths differently. Kohlberg, a leading psychologist in the area of moral development, identified three main sequential levels of development, specifically the *pre-conventional*, *conventional* and *post-conventional* stages.[107] The *pre-conventional* phase represents external morality. It focuses on the avoidance of punishment and is characterised by egocentric reasoning. A rudimentary type of reciprocity, founded on an instrumental and pragmatic view of morality, emerges at this stage of development. The *conventional* phase of moral reasoning involves a basic understanding of conventional morality and its significance in upholding society. An awareness of shared feelings and expectations and their importance over and above personal interests is exhibited. Subsequently, perspective taking as a member of a society larger than one's local community develops. Thus the realisation that one ought to obey the laws of society in order to maintain a system protecting all is acquired at this stage. The final phase, the *post-conventional*, is symbolised by principled reasoning, emphasising underlying principles of morality rather than the letter of the law. Thus individuals at this stage of moral development apply ethical principles of fairness, with an understanding of the universalibility of certain concepts such as regard for life. Theoretically, individuals then develop a higher understanding of their own independent morality.[108]

[107] L. Kohlberg *The Philosophy of Moral Development: Moral Stages and the Idea of Justice* (Harper & Row 1981).
[108] This stage is not empirically supported. See F.C. Power *et al., Lawrence Kohlberg's Approach to Moral Education* (Columbia University Press 1989).

Developmentally, psychopaths seem to be fixed in the earliest stages of pre-conventional morality. So rudimentary is their reasoning that they fail to develop a basic understanding of morality. They fail to distinguish between moral and conventional wrongs.[109] For the psychopath, the wrongfulness of jaywalking is identical to the wrongfulness of robbery.[110] The idea of reciprocity is also foreign to them. Reciprocity is essentially a social ability that requires mutuality of behaviour. The psychopath has no understanding of the concept. An isolated individualist, the psychopath sees others as means to his ends, rather than as persons with interests not unlike his own.

The practical reasoning of psychopaths is so acutely flawed that they fail to learn to avoid punishment. Psychopaths lack the ability to learn from example or experience. They may be able to learn mathematics or logic, but are unmistakably unresponsive to moral teachings. The ability to develop an understanding of morality requires a certain sensitivity and responsivity to others' signals, which the psychopath lacks.[111] Recent research on emotional intelligence suggests that emotions have a lot to do with learning, in particular through curiosity, relatedness, capacity to communicate, and the ability to cooperate.[112] Emotions influence one's ability to recall memories, which in turn enhance one's learning experiences.[113] The emotional memory and consequently the moral learning of the psychopath are aborted, due to his lack of the capacity to experience emotions.

With that in mind, it is clear that the essential capacities that make one a moral agent are absent in psychopath. The psychopath, with

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[109] See R J.R. Blair "A Cognitive Developmental Approach to Morality: Investigating the Psychopath" 57.1 *Cognition* 1-29.
[110] See quote from Ted Bundy in S. Nichols "How Psychopaths Threaten Moral Rationalism: Is it Irrational to Be Amoral?" 85.2 *The Monist* 285-303, at 287.
[111] Blair *et al.*, "Turning a Deaf Ear to Fear: Impaired Recognition of Vocal Affect in Psychopathic Individuals".
[112] Goleman *Emotional Intelligence: Why It Can Matter More than IQ* at 192-194.
[113] See Ibid., at 20-22.

his unrestrained *id* and undeveloped conscience, is simply incapable for following the demands of morality. The following shall more directly discuss the psychology of psychopath. It shall verify that psychopaths indeed lack essential qualities without which agency is negated.

2.6. Reactive-Attitudes and Psychopaths

The moral agency of the psychopath is "an issue on which opinion divides".[114] The preceding discussion demonstrated that psychopaths lack moral agency. Nevertheless, the assumption that psychopaths are moral agents holds strong. Arguably, the apparent sanity of the psychopath and the unpleasantness of his behaviour are at the root of this belief. The ugliness of the psychopathic personality repels us. His mask of sanity makes it easy for us to blame him for that ugliness. However, this does not negate the moral death of the psychopath which remains despite our natural antagonism. It is important to separate our antipathy from the principled evaluation of the agency of the psychopath. Our hostility must not cloud our judgement. If indeed the psychopath lacks moral agency, no amount of dislike justify us blaming him.

The idea that psychopaths are not responsible for their conduct is clearly controversial. They are not delusional, they do not suffer from hallucinations, and they are not compelled to act violently. They appear like men who freely choose to disregard others' interests and society's norms. This is how convincing their mask of sanity is. A cursory examination does not unmask them. Only comprehensive scrutiny exposes their real inadequacy. The glaring "irrationality and incompetence"[115] of the psychopath only "become manifest when he is connected into the circuit of full social life."[116]

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[114] Deigh "Empathy and Universalization", at 745.
[115] Cleckley *The Mask of Sanity*, at 3.

social life."[116] It is then that we are asked to disregard, at least for a short while, the horrific nature of their conduct and consider only their psychic maladjustment. This is a very challenging task.

The antagonistic attitude toward the psychopath is understandable. The horrible crimes ascribed to psychopaths justify resentment and fear. Some of the actions of psychopaths are so monstrous that even if their insanity were definitive and unmistakable, we would still recoil from the idea of excusing behaviour. Films like *Silence of the Lambs* depict the psychopath as charming, intelligent, and definitively dangerous. His manipulation is so subtle even experts are deceived. The image is of a cold and calculating serial killer. In fact most psychopaths are not serial killers, nor are they as intelligent as Hannibal Lecter. Nevertheless, the image is hard to shake, and the cold and calculating appearance inevitably intensifies resentment. Whatever some theorists say about moral agency, we do not like the psychopath, he is not like us, he is evil personified, and he deserves to be punished for the harm he caused.

As natural as this reactive-attitude is,[117] it does not follow that psychopaths ought to be held morally blameworthy for their conduct. We are justified in resenting their behaviour, but not in resenting their existence. We are justified in wanting to protect ourselves from their destructive conduct, but not in imprisoning them.

"*The psychopath is, in a certain way, important to moral thought; but his importance lies in the fact that he appals us, and we must seek some deeper understanding of how and why he appals us. His importance does not lie in his having an appeal as an alternative form of life.*"[118]

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[116] Ibid., at 22.
[117] See P. Strawson "Freedom and Resentment" in P. Strawson (ed) *Freedom and Resentment, and Other Essays* (Methuen 1974) for discussion of objective reactive attitudes.
[118] Williams "The Amoralist", at 10.

One of the main arguments against the thesis presented here construes the argument to mean that the wickedness of the psychopath excuses his behaviour. Lady Wootton famously said "He is, in fact, *par excellence*, and without shame or qualification, the model of the circular process by which mental abnormality is inferred from anti-social behaviour while anti-social behaviour is explained by mental abnormality."[119] According to Lady Wootton consistent wickedness excuses responsibility, whereas moderate wickedness attracts blame and punishment.[120] Thus, the more heinous the acts of the man, the more we are prone to excuse his behaviour. This argument is not without merit. We often call the inexplicable insane, and extremely monstrous behaviour is often incomprehensible. However, since Lady Wootton made her objection the identification of psychopaths has greatly improved. At the time, the description of psychopathy was akin to sociopathy and was heavily behavioural. Today, the diagnosis is far more valid and reliable and is distinguishable from the behavioural disorders of sociopathy and antisocial personality.

Furthermore, Wootton seems to assume that the irresponsibility of psychopaths stems from their behaviour. To exclude liability solely due to a behavioural symptom would indeed be circular and wrong. However, this is hardly the case. Psychopaths ought to be excused not due to their behaviour, but due to their underlying incapacities. Consider the following distinction. The mobster, unlike the psychopath, has loyalties to his fellow mobsters. He is part of an intricate and distinctive moral configuration. His immoral conduct is directed at the moral norms of society as a whole, not those of his group. The psychopath, in contrast, does not have the capacity for such loyalty and adherence to a code of allegiance, and is hardly

[119] B. Wootton "Mental Disorder and the Problem of Moral and Criminal Responsibility" in B. Wootton (ed) *Social Science and Social Pathology* (Allen and Unwin 1959), at 250.
[120] Ibid., at 250.

able to be loyal to himself. The case of the psychopath is not one of reckless disregard, but one of blindness. Thus we would punish the mobster because he chose to disregard the law in favour of his own organisation. The psychopath, on the other hand, is incapable of making such a choice.

The psychopath is "morally dead – an animal rather than a person."[121] Like the animal, the infant and the mentally deranged, the psychopath is not a moral agent; he is moral patient.[122] Moral patients lack the sophisticated abilities which generate the status of agency. They "cannot do what is right, nor can they do what is wrong".[123] Consider the young child. Young David is playing with his friend Joe. Joe is playing with a new toy, which David fancies. David then approaches Joe, hits him and takes the toy. David's sole aim was to get the toy. He cannot be said to have intended to hurt Joe. Most likely, Joe's interests, feelings and wants did not even occur to David. All he saw was his own simple wish to have the toy. David would certainly understand being hurt had he been in Joe's shoes, but he does not have the capacity to imagine it from where he is standing. Similarly, the psychopath who forgot his wallet at home and decided to rob a petrol station and injure the assistant for a case of beer,[124] did not consider the assistant as an individual with interests of his own. Both David and the psychopath are unable to comprehend the moral meaning of their conduct, and do not purposefully breach moral norms. They lack "the ability to do the right thing for the right reasons."[125]

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[121] See Murphy "Moral Death: A Kantian Essay on Psychopathy", at 293. Murphy limits this analogy to the moral context.
[122] T. Regan *The Case for Animal Rights* (University of California Press 1983), chapter 5, at 150-194.
[123] Ibid., at 152.
[124] Example taken from Hare *Without Conscience*, at 58-59. See also Arenella "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability", Dialogue.
[125] S. Wolf "The Reason View" in S. Wolf (ed) *Freedom Within Reason* (OUP 1990) at 81.

Like children, psychopaths should not be considered immoral. They "are not usually active and purposeful pursuers of the bad,"[126] but inadvertent lawbreakers. Therefore they are better described as amoral.[127] They are asocial beings living in a society, but not of society.[128] In the absence of the capacity to feel empathy, psychopaths are unable to choose pro social behaviour.[129] Empathy requires an awareness of the other as distinct from oneself.[130] Without it one cannot break free from one's own experiences and relate to another. The psychopath, like a young child, does not distinguish himself, his interests, needs, and wants from those of another. He sees himself the centre of the world, with his immediate needs being the only concern.[131] Unaffected and detached, the psychopath fails to recognise that others have interests, needs, and worth comparable to his.

In the absence of empathy, attitudes towards others become indifferent. Consider the range of possible courses of action of a man unable to feel empathy.[132] Uninhibited by concern for others, treating others as means to ends would be natural. Conversely, a man capable of feeling empathy would think twice before

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[126] Kennett "Autism, Empathy, and Moral Agency", at 340.

[127] For a discussion of the moral aspects of the amoralist, see Williams "The Amoralist"

[128] See R. Lindner *Must You Conform?* (Holt, Rinehart & Winston 1956), quoted in A. Harrington *Psychopaths* (If Books 1972), at 11, who said they are "in but not of our world."

[129] See Cleckley *The Mask of Sanity* and Hare *Manual for the Hare Psychopathy Checklist-Revised.* Furthermore, children with psychopathic tendencies were found to be significantly less likely to attribute moral emotions to story characters, compared to children without psychopathic tendencies: R J.R. Blair "Moral Reasoning and the Child with Psychopathic Tendencies" 22.5 *Pers Indiv Differ* 731-739. This data is consistent with the reports on adult psychopaths.

[130] See P. Goldie "Empathy, In-His-Shoes Imagining, and Other Imaginative Processes" in P. Goldie (ed) *The Emotions: A Philosophical Exploration* (Clarendon Press 2000) at 195.

[131] There are different psychological theories of child development and attachment, but they all identify an asocial or egocentric stage in development. See J. Piaget *The Psychology of the Child* (Basic Books 2000), and S. Freud *Three Essays on Sexuality* (Revised Basic Books 2000); J. Bowlby *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Basic Books 1990).

[132] The author has dealt with the menu of choices available to the psychopath in M. Mei-Tal "The Criminal Responsibility of Psychopathic Offenders" 36.2 *Israel Law Rev* 103-121, at 117-118.

exploiting others for his own benefit. The psychopath who wounded a petrol station assistant for a case of beer was not inhibited by empathy to the victim. Most people, non-psychopaths, through empathic ability would be compelled to at least pause to consider the other's interests. The non-psychopath may set aside such concerns, but only after they suggest themselves to him. Furthermore, courses of action that are compassionate would most certainly not occur to the psychopath. Kindness to others would only arise in the course of manipulation aiming at one's own ends. Without empathy, there is no motivational force for choosing unselfish behaviour.[133]

Empirical research supports the case that empathy is motivationally potent.[134] Not only do empathic sentiments reduce interpersonal aggressive behaviour,[135] but they also encourages positively productive behaviour. The motivation to help others in need originates from feelings of empathy towards those others.[136] Arguably, the ability to feel empathy is the product of natural selection,[137] aimed at survival through the preservation of social groups. For a society to sustain itself, individual members must consider their membership as important, and respect the interests of both society as a whole and other members of society as individuals. The psychopath, being an isolated being, is not a genuine part of society. But we are.

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[133] Williams "The Amoralist" in, discusses an amoralist analogous to, if not the same as, the psychopath. At 7-8: "The effects of moral education can actually be to make people want to act, quite often, in a non-self-interested way, and it often succeeds in making it at least quite difficult, for internal reasons, to behave appallingly."

[134] See C.D. Bateson *et al.*, "Is Empathetic Emotion A Source of Altruistic Motivation?" 40 *J. Pers. Soc. Psychol.* 290-302; G.P. Knights *et al.*, "Affective Reasoning as a Disposition" 66 *J. Pers. Soc. Psychol.* 178-183.

[135] N. Eisenberg and P.A. Miller "The Relationship of Empathy to Aggressive and Externalising/Antisocial Behaviour" 103 *Psychol. Bull.* 324-344.

[136] See Bateson *et al.*, "Is Empathetic Emotion A Source of Altruistic Motivation?" When escape was an option, only 17% of those who felt empathy escaped; the majority helped the person in need.

[137] See M.L. Hoffman "Is Altruism Part of Human Nature?" Ibid. 121-137.

As a society of non-psychopaths we ought to consider a response to psychopaths that respects our own moral agency, if not their own. Some would argue that morally dead beings who have no moral duties, equally have no rights.[138] Since psychopaths are more like animals than they are people, they cannot be regarded as ends in themselves. They can therefore be used as means to our ends. However, consider the words of Nietzsche. "He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee."[139] The unflattering corollaries of treating moral patients as means to ends should themselves dissuade us. To treat a psychopath objectively is to treat him in the same way he treats others, as objects, irrespective of their concerns. When we proclaim the behaviour of psychopaths as depraved, we ought to abide by our own judgements and not exhibit the same disregard to them. Overlooking their basic rights as human beings may prove itself a dangerous slippery slope. We ought not to show such disrespect to them.[140]

2.7. Conclusion

Beginning with legal conceptions of accountability, this chapter has shown that the legalistic emphasis on cognitive capacities at the expense of the sentiment is unfounded. Despite the fact that cognitive abilities are essential to moral agency, they are not sufficient. A holistic view of moral agency incorporates both cognition and emotion. Support for such view comes from philosophical and psychological notions of moral agency. Consequently and in light of affective deficiencies of the psychopath, both empathic and prudential, they cannot be seen as

[138] See Murphy "Moral Death: A Kantian Essay on Psychopathy", at 294-296.
[139] F.W. Nietzsche *Beyond Good and Evil* (Barnes & Noble 1996), Apophthegms and Interludes, section 146.
[140] See T. Regan "Indirect Duty Views" in T. Regan (ed) *The Case for Animal Rights* (University of California Press 1983), at 150-161, where he argues that moral patients must be owed direct duties.

moral agents. Therefore we are unjustified in holding them accountable for their amoral conduct. This does not mean, however, that we do nothing. We may choose to manage them outside the criminal justice system, specifically in the mental health system. So long as we respect their human rights, therapeutic detention in a mental health environment is justified.

"But if I find a man to whom it literally makes no difference whether he kicks a pebble or kills his family, since either would be an antidote to ennui or inactivity, I shall not be disposed, like consistent relativists, to attribute to him merely a different code of morality from my own or that of most men, but shall begin to speak of insanity and inhumanity".[141]

[141] I. Berlin "Does Political Theory Still Exist?" in I. Berlin (ed) *Concepts and Categories: Philosophical Essays* (Princeton University Press 1999), at 166.

CHAPTER THREE: PSYCHOPATHY AND RISK ASSESSMENT

3.1. Introduction

Risk[1] assessment procedures have become indispensable for determining suitable management options for selected groups of offenders, predominantly recidivists. Risk assessment has been said to be "the cornerstone of good correctional/forensic practice"[2] due to its value in bail and sentencing decisions, security rankings, correctional placement and management, rehabilitation planning, release decisions and supervision intensity. Expertise in risk assessment has seen a noticeable development in the last couple of decades, in concert with widespread dissatisfaction with conventional management structures beginning in the 1970s.[3] Beginning in the mid-1970s, civil commitment procedures saw an upsurge in dangerousness predictions to inform management and release decisions.[4] This was followed by dangerousness predictions in the criminal justice system with respect to indeterminate prison sentences. However, research indicated that the reliability of these clinical predictions of dangerousness was not high.[5] The 1980s saw increased research into risk assessment that placed more emphasis

[1] Risk in this context is almost synonymous with probability. It does not refer to the risk a decision-maker takes when making particular decisions. Rather, it refers to the probability that a particular individual will commit certain criminal acts. The risk is the probability attached to the future behaviour of the individual whose behaviour we are trying to predict.

[2] D J. Simourd "Introduction to the Special Issue: Risk Assessment in Contemporary Corrections" 29.4 *Crim Justice Behav* 351-354.

[3] See P. Gendreau "Risk Assessment and the Control of Risk in the Community" (*Ottawa Conference* 2000), where quantitative review of the research literature found that for most offenders, prisons do not reduce recidivism. See also R. Martinson "What works? Questions and Answers About Prison Reform" 35 *Public Interest* 22-54.

[4] Called the 'first generation' of research on the prediction of violent behaviour, by J. Monahan "The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy" 141.1 *Am J Psychiat* 10-15, at 10. For a three-generation division of risk assessment measures, see J. Bonta "Risk-Needs Assessment and Treatment" in A.T. Harland (ed) *Choosing Correctional Options that Work: Defining the Demand and Evaluating the Supply* (Sage Publications 1996), at 19-28.

[5] Monahan, 1984.

on data and actuarial methods. Thus, reliability of risk assessment procedures has improved.

Nevertheless, it is important to bear in mind that risk assessment processes remain imperfect. The errors intrinsic to risk assessment occur when clinicians wrongfully assess an individual as dangerous or high-risk (false-positive) or deem an individual safe or low-risk and then see him recidivate (false-negative). The rate of errors, however, may be lowered and the following discussion shall demonstrate that actuarial risk assessments, especially those counting dynamic risk factors, have significantly enhanced accuracy. Thus, it shall be argued that despite the fact that perfectly accurate assessments and predictions are unfeasible, certain risk measures are accurate enough to be utilised by both the mental health and criminal justice systems.[6]

As was discussed in a previous section, psychopathy is a clinical disorder deserving of attention in forensic and correctional management circles. The examination in this section shall demonstrate the central value of the assessment of psychopathy in risk assessment practices. Evidence that PCL-R psychopathy is strongly correlated with general and violent recidivism in a variety of populations shall be presented. The advantages of the Psychopathy Checklist will become evident through an exploration of the current state of knowledge in the field of risk assessment. Research suggests that psychopaths are re-convicted and re-incarcerated more than non-psychopaths.[7] More specifically, psychopaths are three times more likely to generally recidivate and four times more likely to recidivate violently than non-

[6] As Shah recognised in the late 1970's, the benefits of risk assessments may justify the process, even if not perfect. S. Shah "Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology" 33 *Am. Psychol.* 224-238, at 230.
[7] S.D. Hart and R.D. Hare "Psychopathy: Assessment and Association with Criminal Conduct" in D. Stoff, J. Breiling and J. Maser (eds) *Handbook of Antisocial Behaviour* (Wiley 1997).

psychopaths.[8] Psychopathy also reliably predicts violent recidivism in correctional[9] and maximum-security psychiatric samples.[10] Moreover, psychopathy is a valid predictor of recidivism among juvenile offenders,[11] female offenders,[12] sexual offenders,[13] and schizophrenic offenders.[14] It is thus clear that psychopathy ought to be a factor to be considered while assessing the risk of recidivism of different population groups. Indeed, several risk assessment instruments incorporate an assessment of PCL-R psychopathy as a risk factor, some of which give it more weight than other predictors.[15] This recognition of psychopathy as a robust predictor of recidivism supports the claim presented here.

Before detailing the value of the Psychopathy Checklist, a couple of distinctions ought to be made. First, the concept of dangerousness shall be presented and contrasted with risk, deducing that the latter is a preferable concept. Then, clinical and actuarial risk assessment processes shall be described, with the scales weighing in favour of actuarial risk assessment. Next shall be a particularised account of some of the more reputable risk assessment instruments available, namely the Violence Risk Appraisal Guide (VRAG), the Level of Service Inventory—Revised (LSI-R), the HCR-20, and the MacArthur community risk assessment study. Following that, a detailed discussion of the efficacy of the Psychopathy Checklist in risk assessment shall be expounded, approaching a conclusion

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[8] J.R. Hemphill *et al.*, "Psychopathy and Recidivism: A Review" 3 *Legal and Criminological Psychology* 139-170, at 160.
[9] R.C. Serin and N.L. Amos "The Role of Psychopathy in the Assessment of Dangerousness" 18.2 *Int J Law Psychiat* 231-238.
[10] G.T. Harris *et al.*, "Psychopathy and Violent Recidivism" 15.6 *L & Hum Behav* 625-637.
[11] A.E. Forth *et al.*, "Assessment of Psychopathy in Male Young Offenders" 2.3 *Psychol Assessment* 342-344.
[12] R.T. Salekin *et al.*, "Psychopathy and Recidivism Among Female Inmates" 22.1 *L & Hum Behav* 109-128.
[13] M.E. Rice and G.T. Harris "Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists" 21.2 Ibid. 231-241.
[14] A. Tengstrom *et al.*, "Psychopathy (PCL-R) as a Predictor of Violent Recidivism Among Criminal Offenders with Schizophrenia" 24.1 Ibid. 45-57
[15] For example, the Violence Risk Appraisal Guide, V.L. Quinsey *et al.*, *Violent Offenders: Appraising and Managing Risk* (American Psychological Association 1998).

advocating the utilisation of the Psychopathy Checklist in risk assessment and management decision-making processes.

3.2. Dangerousness v Risk

Attempting to predict future behaviour of offenders and mentally disordered individuals requires one to decide on what the focus of prediction shall be, namely dangerousness or risk. The following discussion shall demonstrate the difficulties in supporting a focus on dangerousness predictions, despite obvious problems with an emphasis on risk. Notwithstanding the comparable shortcomings of both dangerousness and risk, the shift towards risk has become unavoidable.

Before clarifying what is meant by both dangerousness and risk, it is necessary to consider the development context of these concepts and processes.

Prediction of dangerousness is essentially a clinical enterprise and thus the story of dangerousness predictions is inherently linked to that of clinical assessments.[16] Clinical prediction, often called 'first-generation' assessment,[17] is a subjective judgement based on unstructured interviews, official records data, and management decisions. This is the oldest and most widespread form of evaluation among clinicians.[18] However, despite the fact that clinical predictions remain prevalent, the notion of dangerousness has been replaced by the concept of risk.[19] The replacement of the

[16] See below for discussion of clinical versus actuarial assessments.
[17] Bonta "Risk-Needs Assessment and Treatment" at 19-21; Monahan "The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy"
[18] Bonta "Risk-Needs Assessment and Treatment", at 19-20.
[19] R. Castel "From Dangerousness to Risk" in G. Burchell, C. Gordon and P. Miller (eds) *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991).

dangerousness construct with that of risk assessment has been evident in research literature.[20]

Defining the result to be predicted is essential. Without an adequate definition of dangerousness, prediction is impossible. One cannot possibly predict a result that is too flexible and is influenced by changing notions of individual clinicians. Hence attempting to clarify the concept of dangerousness is vital and shall be attempted here. Regrettably, however, one quickly becomes aware of the complexities of such an endeavour. Despite an understandable initial impression of the definition of 'dangerousness' as transparent, it is highly questionable. To the lay observer, the concept of dangerousness is obvious and in no need of a definition. However, the concept is so hard to define that even the dictionary definition is somewhat obscure. 'Danger' represents a vulnerability to injury, loss or evil and 'dangerous' is defined as causing danger.[21] Thus a dangerous person would be one who causes injury, loss or evil to another. Yet again, this description may appear instantly clear, but it gives rise to several uncertainties, such as whether it is limited to violence, what type of violence, violence towards whom etc. The reference to injury may suggest violence, and some indeed suggest that dangerousness and violence are synonymous.[22] However, the inclusion of loss implies that the violence may not be exclusively against the person and could possibly include violence against property. Accordingly, those who cause financial loss or property damage to others may be said to be acting dangerously. Thus, Enron's market manipulation represents a financial example of dangerousness. The effect of such white-collar crime is undeniably enormous, with colossal financial losses to

[20] See Bonta's discussion of third-generation risk assessment in Bonta "Risk-Needs Assessment and Treatment" in and J. Bonta "Offender Risk Assessment: Guidelines for Selection and Use" 29.4 *Crim Justice Behav* 355-379.
[21] Collins *Concise Dictionary* (3rd edn HarperCollins 1995).
[22] J. Monahan *Predicting Violent Behaviour: An Assessment of Clinical Techniques* (Sage Publications 1981), at 24. On the contrary, see T.R. Sarbin "The Dangerous Individual: An Outcome of Social Identity Transformations" *Brit J Criminology* 285-295 for the view that danger and violence do not have a common boundary.

governments, companies, and individuals, leading to serious economical concerns for society as a whole. Indeed Hare and Babiak suggest that some of these white-collar offenders may be psychopaths and recommend that organisations evaluate their employees for psychopathy using the B-Scan.[23] Nevertheless, society's reaction to white-collar crime does not yet support a designation of dangerousness to these 'snakes in suits'.[24] White-collar crime is essentially an indirect crime of larceny. The indirect nature of this type of offence makes it easy to overlook the gravity of the loss, and avoid treating it as a 'real crime'.[25] It is clear, however, that the indirectness is not the main reason of the non-dangerous categorisation; rather it is the fact that this is a property crime, rather than a violent crime. One may be deemed dangerous on the basis of indirect violence. Two examples of indirect killers are Charles Manson and Adolf Hitler. Most people would consider both men to be personifications of the dangerous man, irrespective of indirect connection. Consequently, it would appear that dangerousness may be easily associated with violence, but not so easily associated with property crime, despite the dictionary reference to loss.

The dictionary reference to evil not only has moral connotations, but also religion undertones. And indeed public perception of dangerousness may be influenced by religion.[26] It may also be swayed by society's response to the mentally disordered. The apparent unpredictability of the behaviour of the mentally disordered may produce fear in observers, lay and professionals

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[23] R.D. Hare and P. Babiak *Business Scan* (MHS Unpublished). The B-Scan is currently going through validation studies.
[24] R.D. Hare and P. Babiak *Snakes in Suits: When Psychopaths Go To Work* (MHS Unpublished).
[25] S.P. Griffin "Actors or Activities? On the Social Construction of "White-Collar Crime" in the United States" 37 *CL & SC* 245-276 at 265; S.P. Rosenmerkel "Wrongfulness and Harmfulness as Components of Seriousness of White-Collar Offences" 17.4 *Journal of Contemporary Criminal Justice* 308-327, found that surveys consistently categorise white-collar crime as a low seriousness crime.
[26] M. Petrunik *Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice* (Solicitor General Canada, Ministry Secretariat 1994), at 9.

alike, which in turn results in a portrayal of the mentally disordered as threatening and dangerous.[27] When in doubt about a particular mentally disordered individual, one may be of the opinion that it is better to be safe than sorry and thus classify the individual as dangerous. Indeed, clinicians have the tendency to over-predict dangerousness.[28] The logic of over-predicting dangerousness is amplified by the American *Tarasoff* decision[29] which gave rise to a positive duty owed by psychologists and psychiatrists toward third parties who may be in imminent danger from a patient. Clinicians may therefore prefer to deem a patient dangerous and avoid litigation rather than judging them safe and being found wrong. Apparently the potential threat is considered graver than the potential deprivation of liberty to the individual deemed dangerous which may result from such judgement. This logic does not, however, take into account the fact that one is a potential threat whereas the other is actual deprivation. Granted, potentiality of death or serious injury may compare to deprivation of liberty. However, should the threat be less serious, the deprivation of liberty may be excessive.[30] This brings us back to the question of the potential gravity of harm caused, as discussed above in relation to violence and property.

Dangerousness must have an object, person or property, and the question of whose person or property is harmed occurs here. It appears that professionals from different disciplines may answer this question differently. Judges seem to focus on danger to others, whereas psychiatrists emphasise harm to self.[31] Accordingly, the

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[27] Castel "From Dangerousness to Risk", at 283.
[28] A. Buchanan "Risk and Dangerousness" 29 *Psychol. Med.* 465-473; Monahan *Predicting Violent Behaviour: An Assessment of Clinical Techniques* at 69-93.
[29] *Tarasoff v Regents of University of California* (1976) 17 CAL 3d 425 (Supreme Court of California).
[30] This issue is discussed further in the section dealing with civil commitment and preventive detention.
[31] F.H. Poletiek "How Psychiatrists and Judges Assess the Dangerousness of Persons with Mental Illness: An 'Expertise Bias'" 20 *Behav. Sci. Law* 19-29.

status of a suicidal individual as dangerous would depend on one's perspective.

Legal definitions of dangerousness, especially in the context of civil commitment, tend to refer to dangerousness to self as well as to others.[32] The legal understanding of the concept dangerousness is not more lucid than the previous discussion demonstrates. Reference to likelihood is common,[33] although detailed stipulation of the exact likelihood needed is rarely mentioned, if at all. A similar situation arises in relation to the degree of harm inherent in the concept of dangerousness. It is left to judges to decide on each particular case whether or not the subject is likely enough or not to cause serious enough damage. Clearly, not specifying the exact likelihood of a particular result leads to ambiguity and discrepancy in application.

To recapitulate, it would appear that an agreed operational definition of dangerousness has not been attained. Without a constant agreed definition of dangerousness, reliable prediction is unlikely. Different clinicians will be predicting different results,[34] and the reliability of these predictions would be impossible to measure. The discussion of dangerousness does not, however, end here, as there are issues to discuss, such as ethical concerns.

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[32] See, for example, The Mental Health Act 1983 section 25(1) regarding restrictions on discharge by nearest relative. See also section 2(1) regarding admissions for assessment, which albeit not specifically mentioning dangerousness, refers to patient's safety or protection of others. For further discussion of the Mental Health Act 1983 and proposed reform, see chapter on mental health management.

[33] For a discussion of dangerousness in Australia see D. Ruschena "Determining Dangerousness: Whatever Happened to the Rules of Evidence?" 10.1 *Psychiat Psychol Law* 122-139 at 124; USA – G.H. Morris "Defining Dangerousness: Risking a Dangerous Definition" 10.1 *J Contemp Legal* 61-101, at 77-85; Quebec, Canada – M J. Brouillette and J. Paris "The Dangerousness Criterion for Civil Commitment: The Problem and a Possible Solution" 36 *Can J Psychiat* 285-289.

[34] R.K. Otto "On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature" 18 *Law Psychol Rev* 43-68 argued that sometimes 'dangerousness' was equated by clinicians to involuntary civil commitment status, at 51.

Furthermore, the treatment of the concept of danger, unlike that of risk of recidivism, caused dangerousness to be "a matter of opinion."[35] Dangerousness by definition reveals a value judgement of something or someone as undesirable. A dangerous person poses an unacceptable risk of causing intolerable harm. Labelling someone as dangerous is a political power struggle, where the one deemed dangerous is threatening the social system of those in power.[36] This value judgement alters the meaning of dangerousness depending on the moral norms and social issues of the time. Consider, for example, the attitude towards the communist in 1950's America, or the attitudes toward spies during wartime. Consider too the recently changing attitudes towards international terrorists. The terrorist attacks of September 11th 2001 have changed Western stance toward international terrorism, which was not seen as such a grave danger prior to that event. The social aspect of the concept of dangerousness makes it difficult to control for bias.[37] Risk assessment practices, on the other hand, involve the determination of probability of certain conduct being committed. There is no judgement that is inherently attached to risk assessment. Rather, it is the decisions following risk assessment that involve judgement. Certain risks are deemed unacceptable while others, often equally serious risks, are acceptable. It is generally accepted that avoiding risk altogether is impossible[38] and despite the growing references to our 'risk society',[39] people regularly accepts certain risks despite their seriousness, while rejecting others.

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[35] J. Floud and W. Young *Dangerousness and Criminal Justice* (Heinemann 1981) at 4.
[36] See T.R. Sarbin "The Myth of the Criminal Type" 18 *Monday Evening Papers* 1-31, at 16-17.
[37] See M. Lipsedge "Dangerous Stereotypes" 5.1 *J Forensic Psychiat* 14-19 discussing the stereotype of the black psychiatric patient as dangerous.
[38] David Byrne, European Commissioner for Health and Consumer Protection, recently said: "We must not be deluded by the sometimes seductive, yet false, notion of a zero risk society" in D. Byrne "There is No Zero Risk Society" (*Risk Perception: Science, Public Debate and Policy Making Conference* 2003)
[39] See, for example, N. Gray *et al., Criminal Justice, Mental Health and the Politics of Risk* (Cavendish 2002); R.V. Ericson and K.D. Haggerty *Policing the Risk Society* (Clarendon Press 1997); U. Beck *Risk Society: Towards a New Modernity* (Sage Publications 1992); A. Giddens *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991)

Consider, for example, the risk of a child being abducted. In the UK in 2002, 95% of children reporting sexual and physical abuse knew the abuser.[40] Despite the fact that abuse perpetrated by strangers represents a small fraction of the total child abuse rate, parents appear more fearful of their children being abused by a stranger, and regularly warn their children about talking to strangers. The risk of children being abused by a parent or a person known to the child, on the other hand, seems difficult to protect against and thus is mostly disregarded. A similar situation exists in relation to violence against women. Women are more likely to be sexually attacked by their partners and acquaintances, rather than by strangers.[41] Nevertheless, women are more concerned and anxious about the dark alley stranger attack than they are about domestic violence. Thus, it is clear that risk assessment determinations do not carry the same inherent value judgement as the dangerousness label.

Dangerousness predictions involve an assessment of disposition, which emphasises the person, rather than conduct. The term is used as an attribute of a person, rather than a description of conduct the person might commit under particular circumstances. The labelling of a person as dangerous is derogatory and carries a burdensome stigma.[42] It has been argued that dangerousness is inherent in situations, rather than people,[43] therefore labelling people as dangerous is misguided. This protest seems reasonable in light of the influence of both the surrounding circumstances and the prospective victim on the commission of an offence. Whether a crime is committed generally depends on, among other things, there being a victim accessible, and surrounding circumstances enabling the execution of a crime, in addition to the offender's inclination to

[40] ChildLine "Child Abuse" (2002) <http://www.childline.org.uk/pdfs/info-childabuse.pdf>; see also *Child Maltreatment in the United Kingdom: A Study of the Prevalence of Child Abuse and Neglect: Executive Summary* (2000) at 15.
[41] Home Office *Rape and Sexual Assault of Women: Findings From the British Crime Survey* (Findings 159 2002).
[42] N. Walker "Protecting People" in J.W. Hinton (ed) *Dangerousness: Problems of Assessment and Prediction* (George Allen & Unwin 1983), at 24-5.
[43] Floud and Young *Dangerousness and Criminal Justice.*

commit an offence. Suppose a pickpocket attempts to steal a wallet from a lady walking down a quiet residential street. Should the lady react passively, the crime would conclude as was intended. However, should the lady carry an alarm (e.g., rape alarm), activate it, and struggle with the perpetrator, the latter may feel forced to silence her, thereby utilizing violence.[44] Whether we use 'dangerousness' to describe behaviour or an individual, dangerousness is difficult to predict because it is at least partly situationally determined.

It has been argued that dangerousness should not be ascribed to people as it treats the danger aspect as a trait of character, rather than a course of action one might choose under certain circumstances.[45] Dangerousness, it is argued, is more appropriately a description of behaviour, in the vein of dangerous driving for example. In this case, we declare the driving style to be dangerous due to factors such as speed, steadiness, swerving etc. All relate to behaviour rather than the personality of the driver. We may call him a dangerous driver but we are unlikely to call him a dangerous person. The designation of dangerous driver is not a character trait; rather it is a description of behaviour. Thus, the norm is dangerousness as a description of behaviour rather than personality. Designating a person as dangerous is thus exceptional, and is analogous to the 'dangerous dog' classification. In this light, it seems unjustifiable to attach the dangerousness label to individuals.[46]

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[44] See the US Supreme Court decision in *Jones v US* (1983) 103 S.Ct. 3034 (Supreme Court), where it was said that "crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal".

[45] See Walker "Protecting People", at 24-5.

[46] Some may say this objection applies to all labels, including psychopathy. However, an important distinction between the concept of dangerousness and psychopathy is that dangerousness is not a valid construct. It does not consistently describe what it aims to depict.

The assessment of dangerousness, moreover, has created a false dichotomy between 'dangerous' and 'non-dangerous'. This implies an either/or situation, wherein either a person is entirely inhabited by danger or empty of danger.[47] Treating dangerousness as a dichotomy not only ignores the complexities of behaviour, but also joins together individuals who may require different management approaches.[48] It is certainly easy to distinguish the behaviour of Ted Bundy from that of the Dalai Lama, but clearly most actions fall somewhere in-between. Merely being less peaceful than the Dalai Lama does not make one dangerous, and likewise, being less dangerous that Ted Bundy does not make one safe. Dangerous behaviour fluctuates in degrees, not only of harm but probability of that harm occurring. These degrees and probabilities are not taken into account in the dangerousness analysis, with the result of a diverse group of individuals treated as homogenous. This issue goes beyond the problem of the rate of false-positives. The dangerousness categorisation ignores the dynamic quality of behaviour to some extent determined by transient factors, such as mood, opportunity, encouragement, relationship, employment etc.

Furthermore, since these assessments are predictions of future behaviour, rather than observations of present or past behaviour, a certain amount of uncertainty is inherent in the process. Future behaviour cannot be predicted with absolute certainty and thus inherently involves risk. Risk, in turn, deals with the probability of an event occurring and thus ought to be scaled on a continuum, rather than a yes-no dichotomy. However, all predictions of future behaviour are apt to perceive the choice of whether to take a

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[47] It is important to note here that it is not the concept of dangerousness itself that is dichotomous. Rather, assessment practices, when focusing on dangerousness, tend to view that as a dichotomy. Risk is not qualitatively different, as it can also be construed as dichotomous. However, risk assessment practices have viewed risk as a continuum. Thus the emphasis here is on the practices, rather than the concepts themselves.

[48] See D.A. Cohen "Notes on the Clinical Assessment of Dangerousness in Offender Populations" (2000) <http://members.tripod.com/~dazc/dd.htm#sugg> at 2.

certain course of action as a yes-or-no answer. Yet again, management selections are decisions that do not ascribe stigma to the subject; rather they initiate a certain management course for the subject.

The dangerousness prediction is especially problematic considering the low agreement between clinicians. The 'first generation' assessment practices employed in the prediction of dangerousness were clinical in nature. Clinical judgment of dangerousness relies on psychological theory of aggression and pathology, personal experience, patient perspectives and other insights. There is often missing data, conflicting information, limited time and other uncertainties, which make such judgements complex and subjective. Adding to that the general distrust regarding the scientific basis of psychology, the problems of clinical judgement of dangerousness become evident. Indeed, research has suggested that clinical judgement is inaccurate and unreliable.[49]

The distinction between prediction and assessment ought to be noted here. The concept of dangerousness occurs in the course of predicting behaviour, specifically dangerous behaviour. Assessment, on the other hand, does not involve prediction; rather it assimilates data into a methodical and structured probability analysis. Assessment estimates an individual's likelihood of behaving in a certain manner, rather than predicting an outcome. Assessment provides a management blueprint by calling attention to those risk factors that may be minimised. Risk assessment along with research knowledge can inform us of the responsivity of particular risk factors to intervention, be it long-term or short-term. Predictions of dangerousness, however, are too crude to explain the predictors of behaviour.

[49] Monahan found that clinicians make incorrect judgement more than correct ones: Monahan *Predicting Violent Behaviour: An Assessment of Clinical Techniques*, at 92.

Research has improved assessment methods that focused on risk rather than on dangerousness. Risk assessment, in the context of criminal justice, is the evaluation of risk characteristics to facilitate a determination of whether an individual will offend, how likely is it that the subject will offend, and what harm may transpire as a result of offending. Levels of risk are to be expected both in regard to the probability of offence occurring, namely how likely it is that an individual will cause harm, and to the gravity of the impending offence, both of which are relevant to the assessment of dangerousness. Hence it seems clear that 'dangerous' and 'safe' are merely two extreme points on a multi-point continuum of risk. In its essence, a continuum fails to provide us with a precise criterion for action;[50] rather it requires us to determine a certain cut-off point ascertaining the level above which one is deemed to pose a certain pre-defined risk[51] for whatever purpose.

The words of P.D. Scott, forensic psychiatrist, are fitting here. When discussing the definition of dangerousness, Scott stated: "This definition may be thought to be so unsatisfactory that it would be better for most purposes to substitute a probability figure of this or that sort of damaging behaviour occurring in this or that expected environment."[52] This advice should be considered and its value should be realised. Granted, risk assessment processes are far more complex than dangerousness labels. However, this complexity is pervasive and inherent in any form of behavioural assessment, and should not be eschewed because of its challenges.

Given that in risk assessments we must consider the nature of the offence, the severity of the harm, the frequency of offensive

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[50] Namely, the conduct predicted.
[51] See Walker "Protecting People", at 23-4. Walker discusses the definition of dangerousness referring to the degree of seriousness and probability of harm as assisting in the understanding of the term.
[52] P.D. Scott "Assessing Dangerousness in Criminals" 131 *Brit J Psychiat* 127-142, at 128.

behaviour occurring, the proximity of its occurrence, and the probability of it taking place, attempting a duality of dangerous v. non-dangerous, is too simplistic. In effect, all we can do is estimate risk in terms of relative or provisional terms, rather than dichotomously. Understanding criminal and antisocial behaviour better would enable us to create successful intervention schemes aimed at reducing the risk of offending.[53]

3.3. Clinical v Actuarial

There are several assessment tools used for the identification of high-risk groups among offender populations, as well as forensic populations. There are two main perspectives from which the various tools evolve, namely clinical and actuarial. As previously mentioned, the earlier form of prediction was clinical, informal, and focused on dangerousness. Growing criticism of the inaccuracies of these predictions has led to the development of new assessment procedures that are more quantitative and objective. Research into actuarial risk assessment processes has demonstrated an unprecedented predictive validity. Numerous studies have been made comparing clinical and actuarial risk assessment methods that have, for the most part, endorsed actuarial predictions. The view maintained in this document accepts actuarial methods as superior to clinical methods for current practices, while realising their imperfections. The limitations of actuarial methods are not so severe as to negate their benefits, especially as a robust foundation for future research and development.

Clinical risk assessment is a subjective process assigning qualitative risk measures based on the professional clinical judgement. Clinicians collect factual information about the subject and attempt to identify risk factors utilizing their informed clinical skills. Adequate information is necessary for good clinical assessment and

[53] See Buchanan "Risk and Dangerousness", at 469.

requires obtaining information from a number of sources, such as the subject themselves, family members, work colleagues, as well as records. Emphasis should be placed on historical factors, relating to violent behaviour, relationship and employment stability, mental health, substance abuse etc., the mental state of the subject and environmental factors. The focus of clinical assessment tends be on individuals, rather than groups, and so it relies heavily on the establishment of rapport with the subject. Consequently, clinical judgement is inherently flexible, depending on the attitudes of both clinician and subject as well as the relationship that ensues.[54] Thus, it becomes both informal and difficult to measure. Recreating clinical assessment for the purpose of verifying reliability achieves very erratic results. Interestingly, the confidence of clinicians regarding their predictions appears unrelated to the accuracy of their predictions.[55] This observation explains in part how these misjudgements occur time after time, with little amelioration in flawed judgement practices.

Clinical judgement appears to have low reliability and validity. A number of studies have demonstrated the inferiority of clinical risk assessment, both as compared with actuarial methods and chance. Examination of the 'first-generation' of research on risk assessment maintained that clinical predictions of violence were inferior to chance.[56] Monahan suggested that psychologists and psychiatrists were right only in a third of their predictions.[57] These findings have grave implications and accuse clinical judgement of a random arbitrariness resembling a game of dice. Considering the education and training required by the schooling of clinicians, this is both

[54] D.A. Andrews and J. Bonta *The Psychology of Criminal Conduct* (3rd edn Anderson Publishing 2003), 225-271, at 234, write: "The key feature of the clinical approach is that the reasons for the decision are subjective, sometimes intuitive, and guided by "gut feelings" – they are not empirically validated."
[55] J. Rabinowitz and R. Garelik-Wyler "Accuracy and Confidence in Clinical Assessment of Psychiatric Inpatient Risk of Violence" 22.1 *Int J Law Psychiat* 99-106, at 103.
[56] See H. Steadman "Predicting Dangerousness Among the Mentally Ill: Art, Magic and Science" 6.3-4 Ibid. 381-390
[57] Monahan *Predicting Violent Behaviour* at 92.

unanticipated and seemingly doubtful. Surely clinicians can predict behaviour better than dice. Indeed later studies have shown that clinical judgement is better than chance, at least in predicting male violence in a psychiatric setting.[58]

Further recent studies have confirmed this progress and suggested that improvement is both possible and forthcoming.[59] Methodological problems, it has been argued, were a major cause of low reliability findings in the 1970's and 1980's.[60] Nevertheless, and despite improvements in methodologies, clinical judgment still suffers from low predictive validity.[61] Clinicians tend to over-predict risk of violence of men and under-predict the risk of violence of women,[62] creating a high rate of false-positives and false-negatives, respectively. The main deficiencies of clinical judgement seem to derive from four 'blind spots', namely the lack of precision in classifying result, disregarding base rates, trusting in false correlations, and over-focusing on dispositional markers to the exclusion of environmental factors.[63] It has also been noted that the same individual may reach different risk judgements from the same set of data.[64] Some of these 'blind spots', however, do not solely apply to clinical judgement, and pertain to deficiencies in comparative studies of clinical and actuarial assessments. The

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[58] C.W. Lidz *et al.*, "The Accuracy of Predictions of Violence to Others" 269.8 *JAMA* 1007-1011, at 1010.
[59] Ibid.
[60] See discussion of methodology in Ibid., at 1007. See also discussion in D. Mossman "Assessing Predictions of Violence: Being Accurate about Accuracy" 62.4 *J Consult Clin Psych* 783-792
[61] Lidz *et al.*, "The Accuracy of Predictions of Violence to Others", at 1010; S. Strand *et al.*, "Clinical and Risk Management Factors in Risk Prediction of Mentally Disordered Offenders – More Important than Historical Data? A Retrospective Study of 40 Mentally Disordered Offenders Assessed with the HCR-20 Violence Risk Assessment Scheme" 4 *Legal and Criminological Psychology* 67-76
[62] Rabinowitz and Garelik-Wyler "Accuracy and Confidence in Clinical Assessment of Psychiatric Inpatient Risk of Violence" at 104 suggest that clinicians overestimate violence of men; Lidz *et al.*, "The Accuracy of Predictions of Violence to Others", at 1010, suggest that clinicians underestimate violence of women.
[63] Monahan *Predicting Violent Behaviour: An Assessment of Clinical Techniques* at 58-65.
[64] R.M. Dawes *et al.*, "Clinical Versus Actuarial Judgment" 243 *Science* 1668-1674, at 1671.

previously mentioned distinction between dangerousness and risk is resurfaced here, as we remember that clinical predictions tended to focus on dangerousness, while actuarial assessments have focused on risk.[65] This distinction is essential and cannot be overlooked in the examination of the reliability and validity of clinical predictions. Clearly evaluating measurements that pursue two rather different objects is false. Nevertheless, these objections to the comparison do not alter the fact that actuarial predictions appear to be more accurate than clinical predictions.[66] Thus, it would seem fair to conclude that, as a rule, clinical judgement is inferior to actuarial predictions.[67]

Actuarial predictions are less susceptible to error and are more reproducible due to the fact that they are more rigid mathematical formulas. They are also easier to score and interpret than clinical risk assessment procedures. Actuarial risk assessments are quantitative distributions of probabilities to likelihood and gravity of risk that do not rely on human judgement. Traditionally utilised in the discipline of economics, it was employed in the criminal justice field fairly early.[68] It has since then succeeded in penetrating

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[65] T.R. Litwack "Some Questions for the Field of Violence Risk Assessment and Forensic Mental Health: Or, "Back to Basics" Revisited" 1.2 *Int J Forensic Ment Health* 171-178, at 172.

[66] T.R. Litwack "Actuarial v. Clinical Assessments of Dangerousness" 7 *Psychology, Public Policy, and Law* 409-433 suggests that "actual, direct evidence does not support a preference for actuarial over clinical assessments of dangerousness", at 424, citing two studies that appear to favour clinical judgement. However, one of these studies, W.P. Gardner *et al.*, "A Comparison of Actuarial Methods for Identifying Repetitively Violent Patients with Mental Illnesses" 20.1 *L & Hum Behav* 35-48, concludes that actuarial prediction had lower rates of both false-positives and false-negatives, while the other study appeared in 1983, thereby not considering more recent research illustrating the reliability of actuarial methods – T.R. Holland *et al.*, "Comparison and Combination of Clinical and Statistical Predictions of Recidivism Among Adult Offenders" 68 J. *Appl. Psychol.* 203-211

[67] See W.M. Grove *et al.*, "Clinical Versus Mechanical Prediction: A Metal-Analysis" 12.1 *Psychol Assessment* 19-30, where it is found that, despite a few scattered instances where clinical prediction was more accurate than mechanical prediction, on average mechanical predictions were 10% more accurate than clinical predictions, with higher superiority in 33%-47% of cases.

[68] Andrews and Bonta *The Psychology of Criminal Conduct*, at 234 make a reference to a 1928 study by E.W. Burgess "Factors Determining Success or Failure on Parole" in A.A. Bruce, A J. Harno, E.W. Burgess and J. Landesco (eds) *The*

the field of criminal justice and forensic mental health. However, despite the frequent allusion to actuarial methods as superior, clinicians remain reluctant to make use of them.[69] A number of grounds for avoiding actuarial methods suggest that the situation or patient or the particular clinician are unique and thus actuarial assessment is rightfully avoidable.[70] Many of these objections have been offset with notable counter-arguments.[71] A more serious philosophical objection to actuarial methods relates to the general vs. the particular distinction, reminding us that individual behaviour and group statistics are not interchangeable. Some might argue that it is identical, or at least analogous, to surgery and its likelihood of success.[72] When expecting surgery, it is common to enquire about the likelihood of success or failure of the particular operation. If we extend the clinician's objection to actuarial statistics to this situation, we would say that the aggregate statistics bear little influence on the particular situation. The analogy, however, is erroneous, as it is not the patient who is the subject of prediction, but the disease. Indeed diseases are not 100% predictable, but perhaps they are more easily determined than human behaviour, at least if we accept some degree of free will. A great variety of dynamic factors shape human behaviour, some of which are mood, health, job satisfaction, family situation etc. These factors add unpredictability to behaviour that is absent or less significant in the prognoses of physical syndromes.[73] Either way, what is at issue here

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Workings of the Indeterminate Sentence Law and the Parole System in Illinois (State Board of Parole 1928)

[69] According to W.M. Grove and P.E. Meehl "Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy" 2 *Psychol Public Pol L* 293-320, at 299.

[70] Ibid., especially at 299-305.

[71] Ibid. See also Gardner *et al.*, "A Comparison of Actuarial Methods for Identifying Repetitively Violent Patients with Mental Illnesses"

[72] Grove and Meehl "Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy" at 305.

[73] See H. Steadman "Predicting Dangerousness Among the Mentally Ill: Art, Magic and Science" 6.3-4 *Int J Law Psychiat* 381-390, at 383.

is whether a probability has any meaning in the individual case.[74] Probability in this case comes from the individual being a member of a high-risk group. And thus, we can say that the individual has certain qualities that have been found in other people who have committed certain criminal acts.[75] It may merely mean that the subject is more likely than not to act in a particular fashion. Clearly, the subject may not act in the highly probable manner, and for whatever reason act in an unlikely and unexpected way. Then again, any type of prediction is inherently imprecise to a degree, as it cannot possibly take into account all pertinent factors. Furthermore, as Monahan notes, this concern applies equally to clinical prediction, as it relies on previous experiences of the clinicians with other people who are members of the same group, such as paranoid schizophrenics.[76]

Actuarial risk assessment relies on information from multiple sources to provide statistical data on the probabilities of re-offending. It is thus clear that resulting statistics are only as good as the information they take account of. This limitation exists for all risk assessment procedures, clinical as well as actuarial, and is only rectified through scrupulous and comprehensive information gathering, which is not always possible. There are numerous data sources that need to be collected, such as records data, clinical data, family and employment data etc. These are not always easily available. Due to source accessibility issues, information may be taken from sources far from ideal for the purposes. For example, substance abuse data is often collected from official files, such as offender case files,[77] which overlook the reality that substance abuse

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[74] See L.H. Tribe "Trial by Mathematics: Precision and Ritual in the Legal Process" 84.6 *Harv L Rev* 1329-1393, at 1346-7 who wrote: "But does it really mean anything at all to be "four-fifth certain" in a particular case?"
[75] Monahan *Predicting Violent Behaviour: An Assessment of Clinical Techniques* at 98-100.
[76] Ibid., at 98.
[77] Office of Research and Statistics, Division of Criminal Justice & Colorado Department of Public Safety *Colorado Actuarial Risk Assessment Scale (CARAS): Handbook to Complete the Instrument on Men and Women* (2003)

most often begins at an earlier, unrecorded date. Furthermore, much depends on the soundness of data collection methodologies, as well as the reliability and quality of the data itself. Missing files are often a problem that is difficult to ameliorate. Such data problems affect the reliability and validity of resulting statistics. Furthermore, research seems to indicate that the selection of risk factors is often more significant then the weight ascribed to them.[78] However, some risk assessment instruments, such as the VRAG[79] specify the particular weight to be assigned to individual risk factors. The VRAG assigned PCL-R psychopathy as the premier risk factor, weighing more than the other items. Risk assessment processes other than the VRAG also consider certain risk factors as more weighty than others, such as antisocial associates, attitudes, personality and criminal history.[80] These compare to risk factors seen as weak, such as social class and psychological discomfort.[81]

An important distinction between static and dynamic risk factors[82] ought to be made at this point. All historical factors, such as age at first offence and criminal history, are static or 'tombstone',[83] namely are not vulnerable to outside influences.[84] These risk factors are employed to assess long-term recidivism and identify the groups of offenders or forensic patients most likely to recidivate, generally and violently. In contrast, dynamic risk factors are more frequently

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[78] Dawes *et al.,* "Clinical Versus Actuarial Judgment", at 1673.
[79] See below.
[80] Known as the "Big Four" in Andrews and Bonta *The Psychology of Criminal Conduct* at 239 & 430. The "Big Eight" include factors such as family, substance abuse and social achievement indicators. P. Gendreau *et al.,* "A Meta-Analysis of the Predictors of Adult Recidivism: What Works!" 34.4 *Criminology* 575-607
[81] Andrews and Bonta *The Psychology of Criminal Conduct* at 239 & 430; Gendreau *et al.,* "A Meta-Analysis of the Predictors of Adult Recidivism: What Works!" at 576-577.
[82] For discussion of dynamic risk factors, see Andrews and Bonta *The Psychology of Criminal Conduct*
[83] E. Zamble and V.L. Quinsey *The Criminal Recidivism Process* (Cambridge University Press 2001), at 3.
[84] That is not to say they are completely fixed, as changes may occur, such as increase in number of previous convictions. Ibid., at 3.

employed in assessment of need[85] and prospects of downgrading such risk factors.[86] Dynamic factors are factors that are more susceptible to change and include current or prospective items such as coping mechanisms, antisocial attitudes and sexual preoccupations, substance abuse and criminal socialization.[87] A true dynamic factor is one that precedes and is associated with recidivism, one that can be changed, and one that changes outcome when manipulated.[88] The focus of assessing dynamic factors is on the "*process* of recidivism"[89] rather than the prediction of recidivism. Given that dynamic risk factors are by definition fluid, they ought to be measured more than once in order to establish a relationship with a particular result. Measuring a risk factor once, fails to consider its changes, thereby negating its fluidity. Apparently, continuous appraisal of dynamic risk factors is rare and mostly insignificant.[90] Continually assessing numerous dynamic risk factors of numerous individuals may not be feasible in the majority of circumstances. Unfortunately, risk assessment resources are not abundant and it may often be impossible to consistently measure dynamic risk factors. That is not to say dynamic risk factors are not valuable, but the practical problems facing such assessment ought to be borne in mind. Furthermore, despite arguments confirming the validity of dynamic risk factors in predicting recidivism,[91] static

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[85] 'Need' here refers to factors that through intervention can reduce the probability that the person would perform the criterion action.
[86] Zamble and Quinsey *The Criminal Recidivism Process.*
[87] Ibid., at 5.
[88] M.E. Rice "Appraising Risk of Violence: Is There a Role for Clinical Judgement?" (*Grand Rounds* 2004), slide 42.
[89] Zamble and Quinsey *The Criminal Recidivism Process*, at 6.
[90] G.T. Harris and M.E. Rice "Actuarial Assessment of Risk among Sex Offenders" 989.1 *Ann NY Acad Sci* 198-210, at 204.
[91] F.C. Beech A, Erickson M, et al. "The Relationship Between Static and Dynamic Risk Factors and Reconviction in a Sample of UK Child Abusers" 14 *Sex Abuse* 155-167; R.K. Hanson and M.T. Bussiere "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism" 66.2 *J Consult Clin Psych* 348-362. However, the significance of dynamic risk factors may be limited to sexual offenders, and may not apply equally to the different group of psychopathic offenders. For example, Hanson and Bussiere "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism" 358, found that offenders who did not complete treatment posed an increased risk of general and sexual recidivism. Conversely, some studies have found psychopathic offenders to have an increased risk after completing treatment, Rice *et al.,* "An Evaluation of a

risk factors are more forcefully associated with risk prediction and receive more emphasis in most actuarial risk assessment tools.[92]

An element of dynamic risk factors is the needs principle, which represents the belief that management to reduce recidivism should focus on needs, specifically criminogenic needs.[93] Criminogenic needs include antisocial feelings and attitudes, criminal associates, self-control, anger and hostility, vocational skills, and substance abuse.[94] Studies show that targeting criminogenic needs in treatment settings is associated with reduced recidivism,[95] whereas the opposite is true of non-criminogenic needs.[96] Non-criminogenic needs include fear of official punishment, self-esteem, anxiety, psychological discomfort, and vague emotional or personal problems.[97] Recognition of the important of criminogenic needs to risk assessment and rehabilitation is growing, and risk assessment measures that incorporate such considerations ought to be acknowledged and considered. As the following shall reveal, not all risk assessment instruments emphasise or even contain dynamic and criminogenic risk and need factors. Some do, however, and thus their value may extend beyond mere risk assessment.

Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders"

[92] See discussion below on actual risk assessment instruments such as the VRAG. See also Harris and Rice "Actuarial Assessment of Risk among Sex Offenders"

[93] J.R.P. Ogloff and M.R. Davis "Advances in Offender Assessment and Rehabilitation: Contributions of the Risk/Needs/Responsivity Approach" 10.3 *Psychol Crime Law* 229-242, at 232.

[94] Solicitor General of Canada *Predicting Adult Offender Recidivism: What Works?* (1996), at 5; C. Dowden and D.A. Andrews "What Works in Young Offender Treatment: A Meta-Analysis" 11.2 *Forum*, table 2; J.R.P. Ogloff "Offender Rehabilitation: From 'What Works' to What Next?" 37.3 *Aust Psychol* 245-252, at 248-249.

[95] *Predicting Adult Offender Recidivism: What Works?*, at 5; D.A. Andrews *et al.*, "Classification for Effective Rehabilitation: Rediscovering Psychology" 17 *Crim Justice Behav* 19-52.

[96] Dowden and Andrews "What Works in Young Offender Treatment: A Meta-Analysis"

[97] Ibid., table 3; Ogloff "Offender Rehabilitation: From 'What Works' to What Next?" at

3.4. Risk Assessment Instruments

The following shall examine four of the key risk assessment tools in use today, namely the Violence Risk Appraisal Guide, the Level of Service Inventory–Revised, the HCR-20 (so entitled due to its Historical, Clinical and Risk Management factors, in the total of 20), and the MacArthur risk assessment study. Through this discussion, the importance of psychopathy in risk assessment shall be demonstrated, as the majority of risk assessment tools acknowledge the significance of psychopathy as a risk factor.

3.4.1. VRAG and Violent Recidivism

The Violence Risk Appraisal Guide (VRAG)[98] is one such actuarial risk assessment tool relying heavily on static risk factors. The risk variables assessed in this instrument are not only static in nature but are also measured so as to reduce clinical inconsistency. Historical data are collected through collateral sources describing actual behaviour, rather than self-reports and psychological explanations of behaviour.[99] Clinical intervention cannot, however, be completely eradicated as the VRAG relies on the PCL-R score as a risk factor. The PCL-R diagnosis, as was previously mentioned, is partly based on a semi-structured interview. However, the diagnosis of psychopathy under the PCL-R cannot be reached on the basis of interview alone, and appears to have high predictive validity, thereby lowering error-rates to a tolerable level.[100]

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[98] Quinsey *et al., Violent Offenders: Appraising and Managing Risk*; G.T. Harris *et al.,* "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument" 20 *Crim Justice Behav* 315-355; M.E. Rice and G.T. Harris "Violent Recidivism: Assessing Predictive Validity" 63 *J Consult Clin Psych* 737-748

[99] Quinsey *et al., Violent Offenders: Appraising and Managing Risk* at 164.

[100] See, inter alia, Hare *Manual for the Hare Psychopathy Checklist-Revised* for results in men; M J. Rutherford *et al.,* "Reliability and Validity of the Revised Psychopathy Checklist in Women Methadone Patients" 3 *Assessment* 145-156, for results in women; and A.E. Forth *et al.,* "The Assessment of Psychopathy in Male and Female Noncriminals: Reliability and Validity" 20.5 *Pers Indiv Differ* 531-543 for non-criminals.

A PCL-R score represents one of twelve risk factors calculated under the VRAG as determined by the particular weight assigned to them. These risk factors were determined throughout a seven-year follow-up of a large sample[101] of adult male patients of a maximum-security hospital following release.[102] 31% of the sample did violently recidivate.[103] The risk factor weighed most heavily is the PCL-R score.[104] The other eleven risk factors may be divided into a group of seven factors positively related to violent recidivism, and a group of four factors inversely related to violent recidivism. The risk factors that have a positive relation to violent recidivism are elementary school maladjustment, DSM-III diagnosis of personality disorder, not having lived with natural parents until age 16, failure on prior conditional release, extent and severity of prior non-violent criminal behaviour, never having married, severity of alcohol abuse history. Conversely, the following are inversely related to violent recidivism, namely, whether index offence victim was female, offender's age at index offence, DSM-III diagnosis of schizophrenia, and severity of physical injury to victim of index offence.[105] To restate, of the eight variables positively correlated with violent recidivism, psychopathy scores were deemed the most significant. Furthermore, at least one other risk factor, namely failure on prior conditional release, is an item that is also represented in the PCL-R.[106] Thus, it appears to corroborate the value of the PCL-R as a risk predictor of violent recidivism. This is notable, as the PCL-R was not developed as a risk assessment tool, yet it has proven to be an important precursor for prospective

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[101] 618, to be precise. Rice and Harris "Violent Recidivism: Assessing Predictive Validity" at 739.
[102] Harris *et al.,* "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument".
[103] Rice and Harris "Violent Recidivism: Assessing Predictive Validity" at 740.
[104] Harris *et al.,* "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument" at 326.
[105] G.T. Harris *et al.,* "Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients" 26.4 *L & Hum Behav* 377-394, at 378.
[106] Factor 2 item. Hare *Manual for the Hare Psychopathy Checklist-Revised.*

violence.[107] Furthermore, studies have shown that the PCL-R may be scored solely on the basis of file information, producing satisfactory predictive validity.[108] The logical inference, therefore, is that success of the VRAG in predicting recidivism endorses the utilisation of the PCL-R as a pertinent risk factor for violent recidivism. A qualification to this supposition, however, ought to be borne in mind, as studies have shown unaided PCL-R scores to be less predictive of violent recidivism than the VRAG.[109] This may be associated with differentiation between PCL-R Factor 1 and Factor 2 predictive validity. Factor 1 of the PCL-R draws on principal personality traits, while Factor 2 addresses antisocial lifestyle. The latter is a much better predictor of both general and violent recidivism than the former.[110] This factor includes historical factors, such as early behavioural problems, juvenile delinquency, and revocation of conditional release, which may partly be the reason for the added validity. The adage that 'nothing predicts behaviour like behaviour'[111] has received some empirical support. For instance, one of the best four predictors according to Andrews and Bonta is criminal history.[112] However, this does not diminish the significance of the PCL-R in risk assessment. It merely means that there are

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[107] S.D. Hart *et al.*, "Performance of Male Psychopaths Following Conditional Release from Prison" 56.2 *J Consult Clin Psych* 227-232; R.D. Hare and L.M. McPherson "Violent and Aggressive Behaviour by Criminal Psychopath" 7.1 *Int J Law Psychiat* 35-50; R. Serin *et al.*, "Predictors of Psychopathy and Release Outcome in a Criminal Population" 2.4 *Psychol Assessment* 419-422.

[108] Harris *et al.*, "Psychopathy and Violent Recidivism" Indeed the VRAG was developed using such PCL-R scoring system: Harris *et al.*, "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument" at 321.

[109] W. Loza and G.K. Dhaliwal "Psychometric Evaluation of the Risk Appraisal Guide: A Tool for Assessing Violent Recidivism" 12.6 *J Interpers Violence* 779-794, at 780-781; A J J. Glover *et al.*, "A Comparison of Predictors of General and Violent Recidivism Among High-Risk Federal Offenders" 29.3 *Crim Justice Behav* 235-249.

[110] R.T. Salekin *et al.*, "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness" 3.3 *Clin Psychol-Sci Pr* 203-215, at 212; R. Serin "Violent Recidivism in Criminal Psychopaths" 20.2 *L & Hum Behav* 207-216, at 212-213. See below for further discussion.

[111] J. Gunn "Clinical Approaches to the Assessment of Risk" in D. Carson (ed) *Risk Taking in Mental Disorder: Analyses Policies and Practical Strategies* (SLE Publications Chichester 1990) at 14.

[112] Andrews and Bonta *The Psychology of Criminal Conduct* at 239.

there are other risk factors that are significant and thus ought to be assessed in conjunction with the PCL-R and that Factor 2 of the PCL-R should perhaps receive more emphasis.

The reliability of the VRAG in predicting violent recidivism has been verified beyond the sample on which it was developed, namely psychiatric patients. The VRAG reliably predicts violent recidivism in forensic populations[113] as well as male offenders who are not mentally disordered.[114] In non-mentally disordered populations, however, the VRAG tended to over-predict violence. The VRAG also appears to be inadequate in predicting violent recidivism in women.[115] Despite these disadvantages it seems clear that the VRAG ought to be extensively utilised in a variety of male populations. Indeed, when correctly used, the VRAG is exceptionally capable of predicting violent recidivism.[116] Indeed, recommended for use as a constituent of thorough risk assessment practices,[117] it has been said to be one of the three best-validated risk assessment measures available today.[118] The other two recommended risk assessment measures are the PCL-R and the Level of Service Inventory-Revised (LSI-R).[119]

3.4.2. LSI-R and Supervision

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[113] C.D. Webster *et al., The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men* (Centre of Criminology, University of Toronto 1994); M. Grann *et al.,* "Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20" 27.1 *Crim Justice Behav* 97-114.
[114] Loza and Dhaliwal "Psychometric Evaluation of the Risk Appraisal Guide: A Tool for Assessing Violent Recidivism".
[115] Harris *et al.,* "Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients"
[116] See Harris and Rice "Actuarial Assessment of Risk among Sex Offenders" where they found that the VRAG and SORAG achieved 0.90 on the ROC curve.
[117] Bonta "Offender Risk Assessment: Guidelines for Selection and Use", at 356-357; A.R. Beech *et al.,* "Risk Assessment of Sex Offenders" 34.4 *Prof Psychol: Res Pr* 339-352 recommended the SORAG, which is the sex offender version of the VRAG, at 348.
[118] Bonta "Offender Risk Assessment: Guidelines for Selection and Use" at 357.
[119] Ibid., at 357.

The Level of Service Inventory-Revised,[120] albeit infrequently used by psychologists,[121] was identified as the most useful actuarial measure in a meta-analysis of the research literature.[122] It is a theory-based instrument[123] measuring both need and risk factors. The research that led to the creation of LSI-R began in the 1970's due to a demand for transparency in probation and parole decision-making.[124] It aimed to assist professionals in deciding what the appropriate supervision and services are for a particular individual. The LSI-R therefore fashioned as an accessible and relatively straightforward measure encompassing factors deemed relevant for supervision decisions, as based on thorough research[125] based on "three primary sources: the recidivism literature, the professional opinions of probation officers, and a broad social learning perspective on criminal behaviour".[126]

The LSI-R consists of 54 risk items divided into 10 subcategories signifying the following risk and need factors: criminal history, education/employment, financial, family/marital, accommodation, leisure/recreation, companions, alcohol/drug problem, emotional/personal, and attitude/orientation. Each of the 54 factors is scored in a dichotomous present-absent (1-0) format. Scoring the instrument relies on information gathering from rigorous interviews with the subject, documentation and records of the subject, and verification of earlier findings and data.

A unique characteristic of the LSI-R is the heavy reliance on dynamic risk factors. The majority of risk assessment tools focus

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[120] Previously called the Level of Supervision Inventory. D.A. Andrews and J. Bonta *The Level of Service Inventory-Revised* (MHS 1995).
[121] Bonta "Offender Risk Assessment: Guidelines for Selection and Use", at 357.
[122] Gendreau *et al.*, "A Meta-Analysis of the Predictors of Adult Recidivism: What Works!"
[123] This means that the selection of predictor items was done through theory, rather than statistical analyses.
[124] Andrews and Bonta *The Psychology of Criminal Conduct* at 244.
[125] Including the 'big four' and 'big eight' factors. See Ibid., at, inter alia, 86-99.
[126] Andrews and Bonta *The Level of Service Inventory-Revised* at 1.

almost completely on static and historical factors. This inclusion of dynamic factors makes the LSI-R useful not only in risk assessment but in risk management as well. The LSI-R requires continual assessment of the subject whereas static risk assessment tools do not, as dynamic factors are by definition unstable and are subject to multiple possible changes, such as changes in employment and financial situation, relationships etc. Thus reassessment would be essential for adequate management. Clearly this makes working with the LSI-R less straightforward than other historical risk assessment tools. However, the LSI-R has been shown to be superior to most of these instruments and so may merit application.[127] The LSI-R has been shown to predict recidivism, officially reported or not,[128] with offender populations of different kinds,[129] in different settings,[130] and in different countries.[131] The validity of the LSI-R extends to the prediction of prison misconduct.[132] It is also capable of distinguishing between violent and non-violent offenders.[133]

The LSI-R does not incorporate the PCL-R as a risk factor despite the fact that the authors of the tool recognise psychopaths as high-

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127 Gendreau *et al.*, "A Meta-Analysis of the Predictors of Adult Recidivism: What Works!"; P. Gendreau *et al.*, "Erratum" 30.6 *Crim Justice Behav* 722-724.
128 Ontario Ministry of Correctional Services *The Level of Supervision Inventory. The First Follow-Up.* (1982), at 21, reporting that the LSI previously undetected self-reported criminal behaviour.
129 G. Coulson *et al.*, "Predictive Utility of the LSI for Incarcerated Female Offenders" 23.3 *Crim Justice Behav* 427-439; Harris *et al.*, "Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument".
130 Home Office *Risk and Need Assessment in Probation Services: An Evaluation* (HORS 211 2000); J. Bonta and L.L. Motiuk "Inmate Classification" 20.4 *J Criminal Justice* 343-353.
131 USA – C.T. Lowenkamp *et al.*, "Risk/Need Assessment, Offender Classification, and the Role of Childhood Abuse" 28.5 *Crim Justice Behav* 543-563; Australia – A.K. Cumberland and G J. Boyle "Psychometric Prediction of Recidivism: Utility of the Risk Needs Inventory" 30 *Aust NZ J Criminol* 72-86; UK – *Risk and Need Assessment in Probation Services: An Evaluation*; C.R. Hollin *et al.*, "The Level of Service Inventory-Revised Profile of English Prisoners" 30.4 *Crim Justice Behav* 422-440.
132 P. Gendreau *et al.*, "Predicting Prison Misconduct" 24.4 *Crim Justice Behav* 414-431, at 423.
133 C.R. Hollin and E J. Palmer "Level of Service Inventory-Revised Profiles of Violent and Nonviolent Prisoners" 18.9 *J Interpers Violence* 1075-1086.

risk offenders.[134] However, it has recently been found that psychopaths have greater dynamic needs than non-psychopaths on all subcategories of the LSI-R apart from the financial one.[135] Thus, despite the results of some meta-analyses showing the superiority of the LSI-R,[136] the PCL-R remains an important differentiating tool between the low- and high-risk individual.

3.4.3. HCR-20 and Structured-Clinical Assessment

The HCR-20[137] (20 Historical, Clinical and Risk Management factors) is a structured-clinical risk assessment tool that can be scored in an actuarial manner.[138] Unlike standard clinical assessment, it is not completely unstructured but is also less rigid than actuarial assessments. It aims to assist clinicians in management decision-making by giving them a guide or checklist founded on research findings. As such, the HCR-20 was developed on the basis of empirical literature to assess risk of violence based on three risk factor categories, historical, clinical and risk management, focusing on retrospective, current and prospective variables, respectively. It places more emphasis on static risk factors than dynamic factors, allotting 10 factors to static historical items, and 5 to dynamic ones.[139] The historical scale includes previous violence, age at first violent incident, relationship instability, employment problems, substance use problems, major mental illness, early maladjustment, personality disorder diagnosis, and

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[134] Andrews and Bonta *The Psychology of Criminal Conduct* at 368-380.
[135] D J. Simourd and R.D. Hoge "Criminal Psychopathy: A Risk and Need Perspective" 27.2 *Crim Justice Behav* 256-272, at 269.
[136] Gendreau *et al.,* "A Meta-Analysis of the Predictors of Adult Recidivism: What Works!" P. Gendreau *et al.,* "Is the PCL-R Really the "Unparalleled" Measure of Offender Risk? A Lesson in Knowledge Cumulation" 29.4 *Crim Justice Behav* 397-426.
[137] C.D. Webster *et al., The HCR-20 Scheme: The Assessment of Dangerousness and Risk – Version 1* (Mental Health, Law and Policy Institute, Simon Fraser University 1995); C.D. Webster *et al., HCR-20: Assessing the Risk of Violence, Version 2* (Mental Health, Law and Policy Institute, Simon Fraser University 1997).
[138] J. Monahan *et al., Rethinking Risk Assessment – The MacArthur Study of Mental Disorder and Violence* (OUP 2001), at 8.
[139] And 5 more to management factors.

failure on prior supervision. The clinical scale consists of lack of insight, negative attitudes, active symptoms of major mental illness, impulsivity, and lack of responsivity to treatment. The risk management scale measures the feasibility of future plans, exposure to destabilisers, lack of personal support, non-compliance with remediation attempts, and stress. Psychopathy, as diagnosed by the PCL-R, is included as an historical risk variable, acknowledging its significance as a risk predictor.

Despite being designed to assess risk for violence in people with mental disorders, the HCR-20 is applicable in a broad range of populations, such as the community[140], corrections,[141] and civil,[142] and forensic psychiatric settings.[143] In a study attempting to test the ability of the instrument in distinguishing the violent recidivists from the non-recidivists in a forensic psychiatric setting, high predictive validity was realised .[144] The tool successfully predicted violence in approximately eight cases out of ten, allowing for a 20% error rate. The total scores on the instrument significantly predicted institutional violence. The HCR-20 was also found to distinguish between violent and non-violent offenders among a psychopathic group of Swedish maximum-security prisoners, demonstrating its applicability in correctional settings.[145] Among psychopathic offenders, the risk management subscale was found to be the only

[140] D J. Ross *et al., Facts and Fates: Testing the HCR-20 Against Aggressive Behaviour in Hospital and Community* (Unpublished Manuscript 1998), abstract to be found at <http://www.fnrh.freeserve.co.uk/hcr20.html>.
[141] H. Belfrage *et al.,* "Prediction of Violence Using the HCR-20: a Prospective Study in Two Maximum-Security Correctional Institutions" 11.1 *J Forensic Psychiat* 167-175.
[142] Riverview Hospital, Medicine and Research *Aggression in Psychiatric Patients Using the HCR-20 to Assess Risk for Violence in Hospital and in the Community* (1998).
[143] K.S. Douglas *et al.,* "Assessing the Risk of Violence Among Psychiatric Patients: The HCR-20 Violence Risk Assessment Scheme and the Psychopathy Checklist: Screening Version" 67.6 *J Consult Clin Psych* 917-930; K.S. Douglas *et al.,* "Evaluation of a Model of Violence Risk Assessment Among Forensic Psychiatric Patients" 54.10 *Psychiat Serv* 1372-1379.
[144] Strand *et al.,* "Clinical and Risk Management Factors in Risk Prediction of Mentally Disordered Offenders – More Important than Historical Data? A Retrospective Study of 40 Mentally Disordered Offenders Assessed with the HCR-20 Violence Risk Assessment Scheme", predictive validity – AUC = 80.
[145] Belfrage *et al.,* "Prediction of Violence Using the HCR-20: a Prospective Study in Two Maximum-Security Correctional Institutions"

significant one in predicting violence, while the clinical factors were of less importance.[146]

The HCR-20, however, is still in its early developmental stages of research.[147] The manual authors caution that the HCR-20 "is a guide to assessment, and not a formal psychological test."[148] Furthermore, there are few studies on its predictive validity,[149] and validation studies are yet unfinished. Nonetheless, those few research studies that have been done on the predictive validity of the HRC-20 have found satisfactory predictive validity. New data on this instrument shall make this issue clearer.[150]

3.4.4. MacArthur and Community Violence

The interdisciplinary MacArthur Risk Assessment Study[151] began in 1989 aiming to improve the validity of risk predictor variables by developing a list of predictors and network them together. The study was done on roughly one thousand male and female acute civil patients between the ages of18 and 40 released into the community at three sites.[152] The requisite data were collected from self-reports, collateral reports, and official agency records.

Examination of the relationship among 134 risk variables led to the construction of four risk domains. The personal or dispositional

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146 Ibid., at 170.
147 See C.D. Webster *et al.*, "Violence Risk Assessment: Using Structured Clinical Guides Professionally" 1.2 *Int J Forensic Ment Health* 43-51 for discussion of the future course of the HCR-20.
148 Webster *et al., HCR-20: Assessing the Risk of Violence, Version 2* at 1.
149 Bonta "Offender Risk Assessment: Guidelines for Selection and Use", at 359.
150 R. Borum "Improving the Clinical Practice of Violence Risk Assessment Technology, Guidelines, and Training" 51.9 *Am. Psychol.* 945-956, at 950 wrote: "The field eagerly awaits new data on this instrument."
151 Established by MacArthur J.D., & MacArthur C.T., and consisting of 12 professionals from the disciplines of law, psychiatry, psychology and sociology. See H J. Steadman *et al.*, "From Dangerousness to Risk Assessment: Implications for Appropriate Research Strategies" in S. Hodgins (ed) *Mental Disorder and Crime* (Sage Publications 1993), at 42-50.
152 Monahan *et al., Rethinking Risk Assessment – The MacArthur Study of Mental Disorder and Violence,* see Appendix A, at 147-148.

domain included risk factors such as age, gender, and PCL:SV scores. The Historical domain consisted of factors such as education, employment, family history, psychiatric hospitalisation, and history of violence. Contextual domain factors dealt with the subject's current surrounding circumstances such as family and social networks and supports. Lastly, the clinical domain refers to diagnoses such as antisocial personality disorder, mental health functioning such as depression and existence of delusions,[153] and substance abuse.[154] Interestingly, the screening version of the Psychopathy Checklist was located in the personal domain, rather than the historical one, as in the HCR-20. Bearing in mind the low base-rates of psychopathy in civil psychiatric samples,[155] the percent of high PCL:SV scorers who committed violence was relatively high, at 73%.[156] Furthermore, civil psychiatric patients with a few traits of psychopathy falling below the diagnostic cut-off of the PCL:SV, present a higher risk for violence than are those without such traits.[157]

3.4.5. Summation

As we have seen, the PCL-R is considered a vital risk principle in the majority of state-of-the-art risk assessment instruments. At the centre of the inclusion of psychopathy is the essential make-up of the disorder, namely the psychopathic personality traits and

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[153] Not unlike the status of schizophrenia in the VRAG, delusions were not found to be correlated with violence.
[154] Monahan *et al., Rethinking Risk Assessment – The MacArthur Study of Mental Disorder and Violence* Appendix B, at 163-168. The categorisation chosen by the MacArthur study has been criticised for its vague boundaries. See Home Office *Risk Assessment and Management of Known Sexual and Violent Offenders: A Review of Current Issues* (Police Research Series Paper 140 2001), at 36.
[155] According to Monahan *et al., Rethinking Risk Assessment – The MacArthur Study of Mental Disorder and Violence*, at 67, the prevalence of psychopathy among civil patients is about 8%. In T.L. Nicholls *et al.,* "Assessing Risk for Violence Among Male and Female Civil Psychiatric Patients: The HCR-20, PCL:SV, and VSC" 22.1 *Behav. Sci. Law* 127-158, at 149, the proportion was 1%. See also S.D. Hart *et al., The Hare Psychopathy Checklist: Screening Version (PCL:SV)* (MHS 1995).
[156] Monahan *et al., Rethinking Risk Assessment – The MacArthur Study of Mental Disorder and Violence*, at 68.
[157] Ibid., at 68.

lifestyle, and the predisposition of these individuals to both general and violent criminality. Discounting the disorder as a risk factor may be detrimental to the whole process of assessing risk of future criminality. Psychopathy, on the other hand, not only differentiates between individuals at low- and high-risk, it also improves upon other, more comprehensive, risk assessment instruments. It is clear that the reliability, validity and significance of PCL-R psychopathy is thus crucial to the success and implication of risk assessment as a whole, and indeed to the entire validity of this conceptual strategy. The following shall go into further detail about the predictive validity of PCL-R psychopathy by itself.

3.5. PCL-R and Recidivism

Psychopathy, as defined by the PCL-R, is associated with criminality in a number of ways. Since the formulation of the PCL-R, it has been often held that "psychopathy is an important predictor of recidivism."[158] The disorder appears to be related to delinquency both theoretically and empirically. The intellectual bond between the paradigm and crime has led professionals to investigate further the actual influence of psychopathy on crime. It became clear that psychopaths might be more inclined to offend than other offenders, mentally disordered or not. The question arouse as to the extent to which the disorder triggers crime and the validity of this so-called chain of causation.

A notional link can be perceived from a score of attributes inherent in the disorder of psychopathy. These attributes are in themselves closely associated with criminality. The lack of empathy and impulsivity characteristic of the psychopath, for example, induce the psychopath to regard others as objects, thereby enabling him to

[158] J.F. Hemphill *et al.*, "Psychopathy and Crime: Recidivism and Criminal Careers" in D J. Cooke, A.E. Forth and R.D. Hare (eds) *Psychopathy: Theory, Research and Implications for Society* (Kluwer Academic Publishers 1998).

flagrantly disregard the interests of others.[159] Additionally, the psychopath's poor behavioural controls combined with his failure to take responsibility for his own actions often mean that he imprudently fails to learn from his mistakes as well as from punishment.[160] This may appear to logically predispose him to repeat criminality.

Scores of mental health professionals have studied the recidivism rates of psychopathic offenders in an effort to ascertain whether there is an empirical link sufficiently strong for risk assessment purposes. Discovering such a significant link between psychopathy and recidivism may facilitate forward-looking assessment of the risk these individuals pose. This, in turn, would enable criminal justice officials to base management decisions, at least in part, on future risk evaluations. However, should the connection be close enough to equate psychopathy with criminality, an additional difficulty presents itself, namely that of the direction of the causal route.

As a result, we are inclined to wonder whether empirical research supports the claim that psychopaths are more prone to misconduct than non-psychopaths. The link between psychopathy and recidivism, both general and violent has been studied, in a number of populations and in different settings This correlation appears to be significant. The following discussion shall demonstrate the significance of the correlation between psychopathy and recidivism.

3.5.1. Psychopathy and Crime

As was previously established, the diagnosis of psychopathy is not synonymous with criminal behaviour, and is an empirically valid

[159] See R.D. Hare "Psychopathy as a Risk Factor for Violence" 70.3 *Psychiat Quart* 181-197, at 185 where Hare notes, "psychopaths should be much more likely than other members of the general public to bend and break the rules and laws of society. Because they are emotionally unconnected to the rest of humanity, and because they callously view others as little more than objects".
[160] See Cleckley *The Mask of Sanity*, at 261-267.

clinical disorder. However, the intrinsic propensity toward crime of psychopaths may nevertheless predispose them to criminality. Psychopaths are said to be "responsible for a markedly disproportionate amount of serious crime and social distress."[161] However, such tendency toward violence should not be taken as evidence that psychopathy and criminality are one and the same. Psychopathic criminality is very different in quality from non-psychopathic criminality.[162] Psychopathic offenders are a category onto themselves, fundamentally distinct from 'ordinary criminals'.

There are major differences between the offending behaviour of psychopaths, whether violent or not, and the offending behaviour of other non-psychopathic criminals. The ordinary criminal is usually quite purposive, commonly undertaking to achieve certain results beneficial to him. Often, and even though we disavow his methods, we can understand his aims. Most of us can understand the common criminal's desire for money, property, and power; we simply choose legal and socially and morally acceptable means to achieve those ordinary aims. The psychopath, on the other hand, appears to offend for perplexing reasons and toward incomprehensible aims. He rarely profits from his own exploits, and jeopardising his own safety and freedom, appears to almost unfailingly undermine his own success. The psychopath often ends up shaming and hurting himself more than he does others.[163] Not only is the psychopath more heavily involved in crime than non-psychopathic offenders, he is also involved in a greater variety of offence types.[164]

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[161] Hare "Psychopathy as a Risk Factor for Violence" at 186; Cleckley *The Mask of Sanity*, at 261-267, where Cleckley compares psychopaths to 'ordinary criminals'.
[162] Hare "Psychopathy as a Risk Factor for Violence" at 185-186.
[163] Cleckley *The Mask of Sanity*, at 261-263.
[164] D.S. Kosson *et al.*, "Evaluating the Construct Validity of Psychopathy in Black and White Male Inmates: Three Preliminary Studies" 99.3 *J. Abnorm. Psychol.* 250-259, see results from the third study.

Psychopaths begin their disorderly behaviour in at an earlier age than the non-psychopathic criminal, usually materialising as a conduct disorder in early childhood.[165] In fact, Factor 2 of the PCL-R requires evidence of early behavioural problems as a prerequisite for the diagnosis of psychopathy. Investigating the personal history of the adult psychopath often reveals a youth resplendent with instances of truancy, class disruption, pathological lying, cheating, stealing, vandalism, bullying etc.[166] Furthermore, this appears to be empirically supported, as Psychopathy Checklist scores were found to be significantly correlates with conduct disorder symptoms in young offenders.[167] A study done on adult offenders found similar results, supporting the correlation between childhood conduct problems and adult psychopathy.[168]

Childhood behavioural problems often develop into actual criminality at a younger age in the psychopath, compared to the non-psychopath. Psychopathic offenders usually become acquainted with the criminal justice system for the first time at the ages of 12 or 13,[169] whereas non-psychopathic offenders encounter the criminal justice system for the first time at the age of 15 if they come from a 'poor' background. Non-psychopathic offenders from 'good' backgrounds do not come into contact with the criminal law until the age of 22.[170] So, not only do psychopathic offenders begin their criminal careers early, the age of first encounter appears to be unrelated to their family background. The criminality of non-psychopathic offenders is noticeably affected by family environment, as the difference in age of onset of criminality shows, i.e., 15 and 22. Psychopaths also have higher rate of offending

[165] Hare *Without Conscience*, at 66-67.
[166] Ibid., at 66.
[167] Forth *et al.*, "Assessment of Psychopathy in Male Young Offenders", at 343.
[168] C.S. Abramowitz *et al.*, "The Relationship Between Childhood Attention Deficit Hyperactivity Disorder and Conduct Problems and Adult Psychopathy in Male Inmates" 36.5 *Pers Indiv Differ* 1031-1047, at 1041.
[169] R.D. Hare *et al.*, "Psychopathy and Crime Across the Lifespan" in R.D. Peters, McMahon, R J., & Quinsey, V.L. (ed) *Aggression and Violence Throughout the Life Span* (Sage Publications 1992), at 292.
[170] Ibid., at 292.

before age 20 than do non-psychopaths.[171] Indeed, research shows that adolescent offenders scoring high on the Psychopathy Checklist have more extensive criminal histories compared to other juvenile offenders.[172]

Psychopaths are more active criminals throughout their criminal career, at least until they reach the age of 40.[173] Psychopaths are three times more likely to recidivate than non-psychopaths,[174] and their criminality appears to decline only after they reach their 30s.[175] Non-psychopathic offenders, on the other hand, often peak in their early-to-mid-20s,[176] and gradually peter out soon afterward.[177] So it would appear that psychopaths have a greater propensity for criminality than non-psychopaths, both juvenile and adult. Not only are they caught more often than non-psychopaths, thereby increasing their reconviction rates; they also appear to behave antisocially more often than do non-psychopaths. Psychopaths also appear to have more disciplinary infractions inside institutions,[178] such as psychiatric hospitals,[179] forensic psychiatric hospitals,[180] and prisons.[181] This is also true in juvenile samples.[182]

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171 Hart and Hare "Psychopathy: Assessment and Association with Criminal Conduct", at 26, discussing results of E. Devita *et al.,* "Family Background of Male Criminal Psychopaths [Abstract]" 31.2(a) *Can Psychol* 346.
172 Forth *et al.,* "Assessment of Psychopathy in Male Young Offenders", at 343.
173 R.D. Hare *et al.,* "Male Psychopaths and Their Criminal Careers" 56.5 *J Consult Clin Psych* 710-714, at 713; Hare *et al.,* "Psychopathy and Crime Across the Lifespan", at 293; S. Porter *et al.,* "Investigation of the Criminal and Conditional Release Profiles of Canadian Federal Offenders as a Function of Psychopathy and Age" 25.6 *L & Hum Behav* 647-661, at 653-655.
174 Hemphill *et al.,* "Psychopathy and Recidivism: A Review" at 150.
175 Hare *et al.,* "Male Psychopaths and Their Criminal Careers" at 713.
176 D.P. Farrington "Human Development and Criminal Careers" in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology* (Clarendon Press 1997), at 368-369.
177 Ibid., at 373-374.
178 R.D. Hare *et al.,* "Psychopathy and the Predictive Validity of the PCL-R: An International Perspective" 18.5 *Behav. Sci. Law* 623-645, at 628.
179 K. Heilbrun *et al.,* "Inpatient and Postdischarge Aggression in Mentally Disordered Offenders: The Role of Psychopathy" 13.4 *J Interpers Violence* 514-527, at 518-519.
180 C.D. Hill *et al.,* "Confirmatory Factor Analysis of the Psychopathy Checklist: Screening Version in Offenders With Axis I Disorders" 16.1 *Psychol Assessment* 90-95, at 92-94.
181 A. Wintrup *et al.,* "The Predictive Validity of the PCL-R in High-Risk Mentally Disordered Offenders [Abstract]" 35.2a *Can Psychol* 47.

The *modus operandi* of psychopaths, namely their behaviour topography, also helps distinguishing them from other offenders. The criminal motives of psychopathic offenders are distinct from those of non-psychopathic offenders. Psychopaths are usually motivated by primary emotions or impulses such as frustration and tension, rather then more major emotions such as, anxiety, fear and guilt.[183] Psychopaths typically do not react with aggression as a result of frustration or hostility towards the victims. Rather, they are more instrumental, purposeful and target-oriented in their aggression.[184] Psychopathy Checklist scores appear to discriminate between instrumental and reactive offenders, i.e., offenders whose aggressive behaviour is goal-oriented, as opposed to those whose aggressive behaviour comes as an emotive reaction. Psychopathic offenders have a propensity to offend for a particular end result, such as obtaining property via illegal means. Non-psychopathic offenders, on the other hand, mostly react in anger to victims they know.[185] Psychopathic offenders are more dishonest, manipulative, impulsive, and irresponsible in their dealings with others than are non-psychopathic offenders.[186]

The victims of psychopaths are also unlike those of non-psychopathic criminals. In relation to general criminality, psychopaths tend to victimise unknown males, as contrasted with non-psychopaths who tend to victimise women acquaintances.[187] When engaging in sexual offences, psychopaths tend to target adults more so than non-psychopaths. In a sample of incarcerated

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[182] J.E. Edens *et al.*, "Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review" 19.1 *Behav. Sci. Law* 53-80, at 66-73.
[183] See Cleckley *The Mask of Sanity*, at 395-397; S.E. Williamson *et al.*, "Violence: Criminal Psychopaths and Their Victims" 19 *Can J Behav Sci* 454-462, at 457.
[184] D.G. Cornell *et al.*, "Psychopathy in Instrumental and Reactive Violent Offenders" 64.4 *J Consult Clin Psych* 783-790, at 786.
[185] Ibid., at 788.
[186] Ibid., at 788.
[187] Williamson *et al.*, "Violence: Criminal Psychopaths and Their Victims", at 458-459.

sexual offenders, 38.9% of psychopaths raped only adult victims, compared to 28.2% of non-psychopaths.[188] Psychopaths were also found to be less discriminating in choosing their victims, offending against both adults and children more often than non-psychopaths.[189] This supports the assertion that psychopaths are not specialised, but versatile offenders. Non-psychopaths were more likely than psychopaths to restrict themselves to incest, and child victims.[190] Thus it would appear that psychopathy has low prevalence rates in paedophiliac samples, compared to rapist samples.

Among rapists, psychopaths are more likely to have 'nonsexual' motivations for their crimes, motivations such as sadism and opportunism.[191] Non-psychopaths, on the other hand, have more sexual motivations for their sexual crimes.[192] Among a sample of rapists, PCL-R scores were correlated with the number of previous nonsexual but not with sexual offenses.[193] Psychopaths also seem to be more violent and sadistic in their sexual offending.[194]

Some of these differences between psychopathic and non-psychopathic offenders support the assertion that psychopathic offenders try their hand in a variety of offences, failing to dedicate themselves to a particular type of offence. The non-psychopathic ordinary criminal tends to specialise to a certain extent in theft, or burglary, or rape or other offenders of a particular kind. The sexual

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[188] S. Porter *et al.,* "Profiles of Psychopathy in Incarcerated Sexual Offenders" 27.2 *Crim Justice Behav* 216-233, at 224.
[189] 16.8% of psychopaths, compared with 3.8% of non-psychopaths. Ibid., at 224.
[190] 14.1% of non-psychopaths committed only incest, whereas only 4.2% of psychopaths restricted themselves to incest. In relation to children victims, 25.6% of non-psychopathic sexual offenders targeted children, compared with only 4.3% of psychopaths. Ibid., at 224. See also V.L. Quinsey *et al.,* "Actuarial Prediction of Sexual Recidivism" 10.1 *J Interpers Violence* 85-105, at 94-100.
[191] S.L. Brown and A.E. Forth "Psychopathy and Sexual Assault: Static Risk Factors, Dynamic Precursors, and Rapist Subtypes" 65 J *Consult Clin Psych* 848-857, at 853.
[192] Ibid., at 853.
[193] Ibid., at 854.
[194] Ibid., at 853.

offender scoring low on the PCL-R specialise more than the psychopath in incest, or paedophilia, etc.[195] The typical psychopath, on the other hand, far from specialist,[196] undertakes all kinds of asocial and antisocial behaviour, depending on what the opportunity presents.[197] The criminal versatility of psychopaths is doubtless simply a symptom of their impulsivity[198] and failure to follow plans consistently. The psychopath typically fails to maintain an effort toward any goal, whether legitimate or not. He seems incapable to sticking to his courses of action for long and "eventually cuts short any activity in which he is succeeding, no matter whether it is crime or honest endeavour."[199]

Another aspect distinctive of the psychopath, founded on their detached and unemotional view of others, is their complete lack of loyalty to others.[200] This relates to the pathological egocentricity[201] and parasitic lifestyle[202] typical of the psychopath. These aspects of the psychopathic personality prevent any kind of consequential and lasting connection with other individuals, whether in the criminal world or not. Most offenders have some sort of affiliation to a group,[203] may it be their drug-using peers,[204] gang,[205] mafia or other

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[195] Porter *et al.*, "Profiles of Psychopathy in Incarcerated Sexual Offenders", at 224.
[196] Hart and Hare "Psychopathy: Assessment and Association with Criminal Conduct", at 27; S.D. Hart "Psychopathy and Risk for Violence" in D J. Cooke (ed) *Psychopathy: Theory, Research and Implications for Society* (Kluwer 1998), at 359.
[197] See L. Ellis "Relationship of Criminality and Psychopathy with Eight Other Apparent Behavioural Manifestations of Sub-Optimal Arousal" 8 *Pers Indiv Differ* 905-925, at 910-913.
[198] Hare *Manual for the Hare Psychopathy Checklist-Revised* (Item 14, Factor 2.
[199] Cleckley *The Mask of Sanity* at 364.
[200] Ibid., at 340-341.
[201] See Ibid. Item 9 of the clinical profile, at 346-348.
[202] Hare *Manual for the Hare Psychopathy Checklist-Revised* Item 2 in Factor 2 of the PCL-R.
[203] See H.H. Hyman "Reference Groups" in D. Sills (ed) *International Encyclopaedia of the Social Sciences* (Macmillan Company & Free Press 1968).
[204] D. Best *et al.*, "Getting By With a Little Help from Your Friends: The Impact of Peer Networks on Criminality in a Cohort of Treatment-Seeking Drug Users" 28.3 *Addict. Behav.* 597-603, showing a correlation between drug using peers and drug use.
[205] S.R. Battin *et al.*, "The Contribution of Gang Membership to Delinquency Beyond Delinquent Friends" 36.1 *Criminology* 93-115, showing the correlation between criminality and gang membership.

criminal peer group. The lack of loyalty of the psychopath exhibits itself in relation to the individual psychopath. The typical psychopath, unlike the common criminal, is not concerned with his own long-term interests, and habitually jeopardises his own safety, dignity and freedom.[206]

Despite the fact that the PCL-R was not developed as a risk assessment tool, it has proven valuable in distinguishing between high-risk offenders and low-risk offenders. Indeed, PCL-R scores are correlated with scores on tools specifically designed for risk assessment.[207] In other words, PCL-R scores identifying high-risk individuals are correlated with those high scores on actuarial risk assessment instruments, such as the VRAG, the LSI-R and others.[208] This establishes the predictive validity of the PCL-R. A PCL-R score of 30 and above signifies the disorder of psychopathy.[209] When assessing risk, the categorisation of PCL-R scores in three-fold, distributing scores across high-, medium-, and low-psychopath groups.[210] The recommended trichotomy involves the following scores: individuals scoring 37 or above on the PCL-R are assigned to the psychopathy group,[211] those with PCL-R scores between 24 and 36 are in the intermediary group, and those with PCL-R scores of 23 and below are in the non-psychopathy group.[212] It is important to bear in mind that this division is not perfect and involves a certain number of false-negatives, although the rate of false-positives is reduced.[213] It is also important to note that

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[206] Cleckley *The Mask of Sanity*, at 261-3.
[207] Hemphill *et al.*, "Psychopathy and Recidivism: A Review", at 155-156.
[208] Ibid., at 155-156.
[209] Hare and Hart "Psychopathy, Mental Disorder, and Crime", at 106, a score of 40 being the highest.
[210] Note that in postdictive studies PCL-R scores are often divided into two groups, namely psychopaths (individuals scoring 30 or above on the PCL-R), and non-psychopaths (individuals scoring 20 and below). See, for example, Kosson *et al.*, "Evaluating the Construct Validity of Psychopathy in Black and White Male Inmates: Three Preliminary Studies" At 256, discussing methodology of 3rd study.
[211] Unlike a score of 30 or above for psychopathy as a diagnosis.
[212] Salekin *et al.*, "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness", at 207.
[213] Ibid., at 206-207.

disparate use of cut-off scores affects the consistency of results. Until such consistency in cut-off scores is achieved, some variation in results is to be expected.

The Psychopathy Checklist is a significant risk factor for criminality and recidivism. This correlation between psychopathy and criminal recidivism is independent of those aspects of psychopathy directly linked with criminality, such as history of antisocial behaviour. Research studies on the validity of the PCL-R in assessing risk have controlled for these historical markers using three main methods. First, measuring whether the PCL-R improved assessment based on criminal history and demographic variables, counteracts the link between past and future criminality.[214] Second, removing those PCL-R items pertaining to violence history also challenges the alleged link.[215] Indeed, it was found that the absence of three PCL-R factors, poor behavioural controls, juvenile delinquency, and criminal versatility, did not affect the predictive validity of the PCL-R.[216] Lastly, controlling for overlap of items also showed that the PCL-R, with or without these essentially criminal factors, was highly correlated with outcome assessed.[217] It thus becomes clear that psychopathy is a valid predictor of recidivism, irrespective of its criminality-related items.

Psychopathy Checklist scores significantly contributed to the prediction of outcome. Psychopaths violated the conditions of their release faster and more often than non-psychopaths.[218] Psychopaths were also suspended more often and produced more management problems while released.[219] The trisection into high-, medium-, and

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[214] Hart *et al.*, "Performance of Male Psychopaths Following Conditional Release from Prison" at 227.
[215] Harris *et al.*, "Psychopathy and Violent Recidivism".
[216] Ibid., at 635.
[217] Serin *et al.*, "Predictors of Psychopathy and Release Outcome in a Criminal Population".
[218] Hart *et al.*, "Performance of Male Psychopaths Following Conditional Release from Prison" at 229.
[219] Ibid., at 229-231.

low-PCL-R scorers helped distinguish between risk levels of failures on conditional release from prison. The rate of failures performed by high-scorers was significantly higher than both medium and low groups. Psychopaths failed on release faster and at a higher rate than non-psychopaths.[220] Not surprisingly, the psychopaths were also less able to develop a stable life-style following release, exhibiting frequent relationship changes, failure to follow plans of both personal and professional nature, and so on.[221] Additionally, psychopaths were found to be four times more likely to fail on an unescorted temporary absence from prison than non-psychopathic offenders.[222]

There have been suggestions that the two factors of the PCL-R are not equally predictive of recidivism, suggesting a weakness in the validity of the construct in assessing recidivism.[223] Accordingly, Factor 2 of the PCL-R, representing antisocial lifestyle, was more robust than Factor 1, representing core personality traits, for general and violent recidivism.[224] However, the results of a recent meta-analysis qualify this contention. Apparently, this is true only in relation to general recidivism, as three of the five studies analysed found a greater correlation between Factor 2 and general recidivism.[225] In relation to violent recidivism, however, there was no such difference between Factor 1 and Factor 2 in correlation magnitude.[226] Furthermore, recent findings support the robustness of the correlation between Factor 1 and its items, such as grandiose

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[220] Serin "Violent Recidivism in Criminal Psychopaths" at 210.
[221] Hart *et al.*, "Performance of Male Psychopaths Following Conditional Release from Prison" at 229-231.
[222] Serin *et al.*, "Predictors of Psychopathy and Release Outcome in a Criminal Population" at 420-421.
[223] Gendreau *et al.*, "Is the PCL-R Really the "Unparalleled" Measure of Offender Risk? A Lesson in Knowledge Cumulation" at 410-411.
[224] Ibid., at 410-411.
[225] Hemphill *et al.*, "Psychopathy and Recidivism: A Review" at 151.
[226] Ibid., at 151.

sense of self-worth and shallow affect, and increased recidivism rates.[227]

These findings support the belief that Psychopathy Checklist scores are correlated with risk of general criminality. The following shall demonstrate the significance of psychopathy in assessing violent recidivism, as psychopathy is more significantly correlated with violent crime than it is with general, non-violent crime.

3.5.2. Psychopathy and Violent Recidivism

In addition to the association between psychopathy and general criminality, some studies have suggested that there is a more robust bond between psychopathy and violent behaviour.[228] A recent meta-analysis differed, indicating that the variation of the magnitude of the correlation was not significant.[229] However, the same meta-analysis suggests that PCL-R scores were more strongly correlated with violent recidivism than actuarial risk assessment instruments aimed at assessing violent recidivism.[230] This is contrasted with the correlation between PCL-R scores and actuarial risk scales in relation to general recidivism,[231] which does not situate the PCL-R above other risk factors.[232] In other words, the PCL-R does better than other actuarial risk assessment instruments in predicting violent recidivism, but does not better or worse that other tools in predicting general recidivism. This does not, however, directly relate to the degree of correlation between the PCL-R and general and violent recidivism. Indeed, it was shown that most actuarial risk

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[227] See H J. Richards *et al.,* "Psychopathy and Treatment Response in Incarcerated Female Substance Abusers" 30.2 *Crim Justice Behav* 251-276, at 270. For further discussion of the strength of Factor 1, see Hemphill *et al.,* "Psychopathy and Recidivism: A Review" at 212-214.
[228] Salekin *et al.,* "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness" at 212.
[229] Hemphill *et al.,* "Psychopathy and Recidivism: A Review" at 146-147.
[230] Ibid., at 157-158.
[231] Ibid., at 156.
[232] See above discussion of psychopathy and crime.

that most actuarial risk instruments are more significantly associated with general recidivism than they are with violent recidivism.[233] It does, however, support the argument that the PCL-R ought to be employed in risk assessment processes, especially in relation to violent recidivism.

Retrospective studies on federal prisoners in Canada have shown that psychopaths are more likely than non-psychopaths to use violence and aggression.[234] Prospective studies show similar results in relation to the violent recidivism rates of psychopaths. Psychopathic offenders were between three and five times more likely to violently recidivate than non-psychopaths.[235] The PCL-R was also found to be predictive of violent recidivism among offenders diagnosed with schizophrenia,[236] and personality disorders.[237]

Interestingly enough, psychopaths continue to recidivate violently at a higher rate than non-psychopathic offenders even after the age of 40.[238] This is especially significant since this consistently high rate of recidivism is not mirrored in relation to the general criminality of psychopaths. After reaching the age of 40, psychopaths' general criminality lessens spectacularly, so that their crime rates are similar to those of other non-psychopathic persistent offenders.[239] Their violent criminality, however, does not begin to diminish until much later. Between the ages of 46 and 50, 30% of the offences for which

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[233] Hemphill *et al.*, "Psychopathy and Recidivism: A Review" at 159-160.
[234] R.D. Hare and L.M. McPherson "Violent and Aggressive Behaviour by Criminal Psychopaths" 7.1 *Int J Law Psychiat* 35-50, at 49.
[235] Hemphill *et al.*, "Psychopathy and Recidivism: A Review" at 151.
[236] A. Tengstrom *et al.*, "Psychopathy (PCL-R) as a Predictor of Violent Recidivism Among Criminal Offenders with Schizophrenia" 24.1 *L & Hum Behav* 45-57.
[237] M. Grann *et al.*, "Psychopathy (PCL-R) Predicts Violent Recidivism Among Criminal Offenders with Personality Disorders in Sweden" 23.2 Ibid. 205-217.
[238] G.T. Harris *et al.*, "Psychopathy and Violent Recidivism" 15.6 Ibid. 625-637, at 633.
[239] Hare *et al.*, "Psychopathy and Crime Across the Lifespan", at 293.

psychopaths were convicted were violent.[240] Indeed, there appears to be an increase in their violent criminality after the age of 40.[241] An analysis of psychopathy scores across age periods has shown that total scores on the Psychopathy Checklist erratically decline with age.[242] More specifically, Factor 2 scores decline more significantly than do Factor 1 scores.[243] This could possibly account for the differences between general and violent criminality and the changes in criminality in psychopaths after age 40.

Importantly, psychopathy is a construct applicable in risk assessment processes in a broad range of populations, contexts and settings.[244] Despite the fact that the PCL-R was developed in Canada and originally tested mostly in Canadian forensic populations, several studies have indicated that it is also valid and reliable in other countries as well as non-forensic and more diverse populations.

A study on Black and White inmates in US prisons confirmed that despite certain differences between Blacks and Whites in the distribution of psychopathy scores,[245] there are "more parallels than disparities."[246] In both Blacks and Whites the PCL-R differentiates between psychopaths and non-psychopaths,[247] suggesting that psychopathy exists in Black prisoners and that the PCL-R is a valid

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[240] Ibid., at 293.
[241] Harris *et al.,* "Psychopathy and Violent Recidivism" At 633, see Figure 1.
[242] T J. Harpur and R.D. Hare "Assessment of Psychopathy as a Function of Age" 103.4 *J. Abnorm. Psychol.* 604-609, at 606.
[243] Ibid., at 606.
[244] Salekin *et al.,* "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness", at 207-208.
[245] Kosson *et al.,* "Evaluating the Construct Validity of Psychopathy in Black and White Male Inmates: Three Preliminary Studies" at 252.
[246] Ibid., at 257. See also D J. Cooke *et al.,* "Psychopathy and Ethnicity: Structural, Item, and Test Generalizability of the Psychopathy Checklist-Revised (PCL-R) in Caucasian and African American Participants" 13.4 *Psychol Assessment* 531-542, at 539, where few differences were found between Black and White inmates.

[247] Kosson *et al.,* "Evaluating the Construct Validity of Psychopathy in Black and White Male Inmates: Three Preliminary Studies" at 256-257.

diagnosis and assessment tool.[248] Clearly, one study is insufficient for dismissing healthy doubt and replication studies are needed. In the interim, this study, alongside other studies, suggests that the PCL-R is an instrument worth considering in diverse prison populations. Indeed the PCL-R has been validated in European countries with very different cultures, albeit with lower base rates.[249] Despite certain differences in PCL-R item functioning across cultures, it is clear that the PCL-R identifies psychopathy in diverse cultures,[250] and is a reliable risk factor.[251]

The PCL-R has also been confirmed in civil non-forensic psychiatric samples. Once more, despite low base rates of psychopathy in these populations,[252] the PCL-R and its related instruments have been found to be both valid and reliable.[253] The Screening Version of the Psychopathy Checklist succeeded in differentiating between violent and non-violent patients in these samples.[254] The PCL:SV was also tested in three samples of university undergraduates, finding a particularly low base rate for psychopathy.[255] Regardless, the PCL:SV was positively correlated with childhood and adult symptoms of Antisocial Personality

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[248] See also J.F. Hemphill *et al.,* "Psychopathy and Recidivism Among Black and White Adult Male Offenders" (*1st Annual LAFMHS Conference* 2001).
[249] 8% in Scotland, see D J. Cooke "Psychopathy Across Cultures" in D J. Cooke, A.E. Forth and R.D. Hare (eds) *Psychopathy: Theory, Research, and Implications for Society* (Kluwer 1998), at 30; 14.66% in Portugal, see Gonclaves "Psychopathy and Offender Types: Results from a Portuguese Prison Sample", at 342; 13 in England, see Hare *et al.,* "Psychopathy and the Predictive Validity of the PCL-R: An International Perspective" at 634.
[250] Cooke "Psychopathy Across Cultures", at 20-21.
[251] Gonclaves "Psychopathy and Offender Types: Results from a Portuguese Prison Sample", at 342-343; K. Rasmussen *et al.,* "Personality Disorders, Psychopathy, and Crime in a Norwegian Prison Population" 22.1 *Int J Law Psychiat* 91-97, at 95; M. Grann *et al.,* "Psychopathy (PCL-R) Predicts Violent Recidivism Among Criminal Offenders with Personality Disorders in Sweden" 23.2 *L & Hum Behav* 205-217, at; Hare *et al.,* "Psychopathy and the Predictive Validity of the PCL-R: An International Perspective" At 635-639.
[252] 8% according to J.L. Skeem and E.P. Mulvey "Psychopathy and Community Violence Among Civil Psychiatric Patients: Results From the MacArthur Violence Risk Assessment Study" 69 J *Consult Clin Psych* 358-374, at 363.
[253] Ibid. using the PCL:SV, see discussion at 368.
[254] Ibid., at 365.
[255] 1.03%, Forth *et al.,* "The Assessment of Psychopathy in Male and Female Noncriminals: Reliability and Validity", at 537.

Disorder as well as alcohol and drug abuse.[256] Significant differences between males and females in the prevalence of high PCL:SV scores were found, with males scoring higher than women.[257] The mean scores of males tend to be higher than those of females,[258] although these are not as significant in correctional samples as they are in non-forensic and non-clinical samples.

The differences between males and females in the prevalence of psychopathy in correctional samples are also not as significant as in non-clinical samples. The prevalence of psychopathy among female offenders is lower than that among male offenders, although it is not as significant as in non-forensic samples. The base rates of PCL-R psychopathy appear to range from 11% to 23%,[259] lower than the base rate among male prisoners.[260] There appear to be factor structure differences between male and female offenders,[261] although those could be attributed to race differences, which have been reported in relation to male offenders.[262] Despite the differences, validity and reliability of the PCL-R is comparable in women to that in men.[263]

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[256] Ibid., at 541.
[257] Ibid., at 536-537.
[258] Females' mean PCL-R total score was 14.2, compared to males' 23.6, see M J. Rutherford *et al.*, "Antisocial Personality Disorder and Psychopathy in Cocaine-Dependent Women" 156.6 *Am J Psychiat* 849-856, at 852-853.
[259] There is evidence of base rates both lower and higher than the 11%-23% range, although they are atypical. See J.E. Vitale and J.P. Newman "Using the Psychopathy Checklist-Revised With Female Samples: Reliability, Validity, and Implications for Clinical Utility" 8.1 *Clin Psychol* 117-132 at 122-124; J.E. Vitale *et al.*, "The Reliability and Validity of the Psychopathy Checklist-Revised in a Sample of Female Offenders" 29.2 *Crim Justice Behav* 202-231, at 204-205.
[260] Between 15% and 30%: Salekin *et al.*, "Psychopathy and Recidivism Among Female Inmates" at
[261] R.T. Salekin *et al.*, "Construct Validity of Psychopathy in a Female Offender Sample: A Multitrait-Multimethod Evaluation" 106 *J. Abnorm. Psychol.* 576-585, at 579, finding more overlap among the two factors in females than in males.
[262] D.S. Kosson *et al.*, "Evaluating the Construct Validity of Psychopathy in Black and White Male Inmates: Three Preliminary Studies" 99.3 Ibid. 250-259. See Vitale *et al.*, "The Reliability and Validity of the Psychopathy Checklist-Revised in a Sample of Female Offenders" at 205.
[263] Vitale *et al.*, "The Reliability and Validity of the Psychopathy Checklist-Revised in a Sample of Female Offenders" at 222.

Moreover, the PCL-R has been found to be functional in assessing criminality among juveniles in both civil psychiatric and correctional settings. Female and male adolescents between the ages of 12 and 17 who scored high on the PCL-R exhibited both reactive and instrumental aggressive behaviour at higher incidence rate than adolescents rated lower in psychopathy.[264] PCL-R scores in adolescent offenders[265] were also correlated with conduct disorder symptoms, history of violent offences and institutional aggression, as well as violent recidivism.[266] A study on somewhat older juvenile delinquents found PCL-R Factor 2 scores to be correlated with substance abuse or dependency.[267]

Despite the utility of the PCL-R in adolescents, Hare and his colleagues have developed a version specifically aimed at adolescents. The youth version of the PCL-R (PCL:YV)[268] was devised to assess marks of psychopathy in adolescents, making allowances for their limited life experience by modifying the adult version. The PCL-:YV was developed to assess risk for antisocial behavioural patterns, such as cheating, fighting, and bullying, in male and female delinquents between the ages of 12 and 18. The items on the PCL-R had to be modified to fit juveniles, and so two of the items were deleted[269] while some others were adapted. The PCL:YV thus has 20 PCL:YV items, namely, impression management, grandiose sense of self worth; stimulation seeking; pathological lying; manipulation for personal gain; lack of remorse; shallow affect; callous/lack of empathy; parasitic orientation; poor anger control; impersonal sexual behaviour; early behaviour problems; lacks goals; impulsivity; irresponsibility; failure to accept

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[264] E. Stafford and D.G. Cornell "Psychopathy Scores Predict Adolescent Inpatient Aggression" 10.1 *Assessment* 102-112, at 106-109.
[265] Mean age of 16.3, see Forth *et al.*, "Assessment of Psychopathy in Male Young Offenders" at 342.
[266] Ibid., at 343.
[267] A.A. Moeller and D. Hell "Affective Disorder and 'Psychopathy' in a Sample of Younger Male Delinquents" 107.3 *Acta Psychiat Scand* 203-207, at 204.
[268] Forth *et al., The Psychopathy Checklist: Youth Version* .
[269] Items 9 and 17, Parasitic Lifestyle, and Many Short-Term Marital Relationships.

responsibility; unstable interpersonal relationships; serious criminal behaviour; serious violations of conditional release; and criminal versatility.[270] Like the PCL-R, information gathering emanates from a semi-structured interview and collateral information exploring issues such as school adjustment, interpersonal relationships and family life, attitudes, substance use, antisocial behaviour and goals. A total score of 30 is the cut-off point for consideration of psychopathic traits.

Follow-up evidence has yet to be uncovered, as the tool is fairly new, but verification regarding its ability to identify reliably youth with psychopathic tendencies has been established. As hypothesised, it was found that those with high PCL:SV scores embarked on their criminal careers at a younger age than low scorer. There is an age gap of 2 years in the mean age of onset of violent behaviour between high and low scorers, and 3 years in relation to non-violent behaviour.[271] Juveniles scoring high on the PCL:SV tend to begin their non-violent criminal career at age 9.3 and their violent criminal career at age 12.1.[272] PCLY:YV scores were found to be significantly correlated with violent offence history, un-adjudicated violence and institutional violence, as well as severity and instrumentality of prior violence, at a base rate of 16%.[273] Psychopathic traits were also related to violent and versatile past criminal behaviour, as opposed to non-violent criminal behaviour.[274]

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[270] Forth *et al., The Psychopathy Checklist: Youth Version.*
[271] A.E. Forth and H.C. Burke "Psychopathy in Adolescence: Assessment, Violence, and Developmental Precursors" in D J. Cooke, A.E. Forth and R.D. Hare (eds) *Psychopathy: Theory, Research and Implications for Society* (Kluwer Academic Publishers 1998), at 213-4.
[272] Ibid., at 213-214.
[273] D.C. Murrie *et al.,* "Psychopathy Scores and Violence Among Juvenile Offenders: A Multi-Measure Study" 22.1 *Behav. Sci. Law* 49-67, at 58-62.
[274] M.A. Campbell *et al.,* "Psychopathic Traits in Adolescent Offenders: An Evaluation of Criminal History, Clinical, and Psychosocial Correlates" Ibid. 23-47, at 38.

The correlation between PCL:YV scores and treatment behaviour and outcome was studied in a sample of adolescent substance abusers.[275] Psychopathic characteristics were found to associate with poor treatment behaviour and outcome, as well as the number of arrests following treatment completion.[276] Furthermore, youth with psychopathic traits undertake a larger number of delinquent actions compared to youth with no psychopathic traits, their behaviour is more violent, they pose more problems during treatment programs and recidivate more rapidly.[277]

Notwithstanding the fact that this measurement is in the early stages of review, it appears as though it succeeds in identifying adolescents with markers of psychopathy. It appears to measure reliably psychopathic traits and these in turn appear to be similar to those in adults. Like the PCL-R and adult psychopathy, psychopathic traits in adolescents are more highly correlated with violent criminality than with non-violent criminality.[278] The PCL:YV also confirms adult evidence of early onset age of criminal behaviour, versatile criminality, increased rate of criminality and instrumental aggressive behaviour. It shows no significant gender, race or ethnic differences.[279] Furthermore, the affective hunger and distinctive interpersonal relationship typical of the adult psychopath reveals itself at a young age,[280] and despite a rather high number of traumatic experiences and sexual assaults that PCL-R scores are

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[275] M.L. O'Neill *et al.,* "Adolescents with Psychopathic Characteristics in a Substance Abusing Cohort: Treatment Process and Outcomes" 27.3 *L & Hum Behav* 299-313.
[276] Ibid., at 308.
[277] Forth and Burke "Psychopathy in Adolescence: Assessment, Violence, and Developmental Precursors", at 214-6.
[278] R.R. Corrado *et al.,* "Predictive Validity of the Psychopathy Checklist: Youth Version for General and Violent Recidivism" 22.1 *Behav. Sci. Law* 5-22, at 18.
[279] M.A. Campbell *et al.,* "Psychopathic Traits in Adolescent Offenders: An Evaluation of Criminal History, Clinical, and Psychosocial Correlates" Ibid. 23-47, at 35; O'Neill *et al.,* "Adolescents with Psychopathic Characteristics in a Substance Abusing Cohort: Treatment Process and Outcomes" at 308.
[280] Kosson *et al.,* "The Reliability and Validity of the Psychopathy Checklist: Youth Version (PCL:YV) in Nonincarcerated Adolescent Males", at 105.

linked with, there is no evidence of traumatic stress.[281] Thus, despite the lower based rates of psychopathic traits in adolescents[282] The validity and reliability of the PCL:YV is encouraging, especially considering the implicated possibilities of early intervention.

High scores on the PCL-R may be a sufficient basis for reckoning that one is at a high risk for future violence. The reverse, however, is not true, as low scores on the PCL-R do not necessarily mean low risk.[283] There may be other risk factors involved, such as criminal history, criminal attitudes, and criminal associates.[284] Taking this into account, it has been reported that the overall accuracy of violence predictions on the basis of the PCL-R is 78%,[285] meaning that assessments of risk are inaccurate in 22% of instances. In relation to general recidivism, one study found the accuracy of prediction to be 60.5%, with a rather high false-negative rate, 35.8%, and a low false-positive rate, 3.7%.[286] Despite the fact that the accuracy of PCL-R assessment of violent recidivism is superior to the assessment of general recidivism, the rate of false-negatives is too high to ignore. Indeed, some have argued that the superiority of the PCL-R as a risk assessment tool is baseless, and that the LSI-R, for example, is superior to the PCL-R.[287] This criticism of the validity of the PCL-R as a risk assessment instrument came as a reaction to an alleged and unequivocal assertion "that psychopathy was the most important clinical

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[281] Moeller and Hell "Affective Disorder and 'Psychopathy' in a Sample of Younger Male Delinquents" At 204.
[282] Prevalence of PCL:YV high scorers ranges from 15% to 37% depending on the sample, see M.A. Campbell *et al.,* "Psychopathic Traits in Adolescent Offenders: An Evaluation of Criminal History, Clinical, and Psychosocial Correlates" 22.1 *Behav. Sci. Law* 23-47, at 24, although in that study the prevalence was lower – 9.4%, at 35.
[283] See Hart "Psychopathy and Risk for Violence", at 369.
[284] The latter three are incorporated in the "Big Four" risk factors, see Andrews and Bonta *The Psychology of Criminal Conduct* at 76.
[285] Hart "Psychopathy and Risk for Violence", at 364.
[286] Serin "Violent Recidivism in Criminal Psychopaths", at 213.
[287] Gendreau *et al.,* "Is the PCL-R Really the "Unparalleled" Measure of Offender Risk? A Lesson in Knowledge Cumulation" at 411.

construct in the prediction of offender risk."[288] However, no such assertion was made. Rather, the creator of the PCL-R referred to the construct as "the single most important clinical construct in the criminal justice system".[289] Arguing that the PCL-R is an unparalleled clinical construct in the criminal justice system is not saying it is such as a risk assessment instrument. Indeed the construct of psychopathy is unique as a clinical diagnosis in its capacity to explain theoretically criminal behaviour as well as assist in criminal justice management. The PCL-R helps us understand criminal behaviour better because of the unique and distinct nature of psychopathic the criminality. Clinical constructs such as Antisocial Personality Disorder are not as specific and distinct as psychopathy and thus do not provide us with new information about the criminality of those diagnosed as suffering from that disorder. The fact that the PCL-R additionally does as well or better than actuarial risk instruments specifically formed for that purpose is significant. The Psychopathy Checklist is a robust predictor of recidivism, especially violent recidivism, but, not unlike other risk assessment instruments, it does not achieve perfect prediction.

3.5.3. Summation

The inevitability of human miscalculation, be it due to the inherent unpredictability of human behaviour or the imperfect understanding of it, is partly to blame for this imperfection. All things considered, assessments of recidivism on the basis of the PCL-R are reliably better than chance, as well as demographic, clinical, and criminal history risk factors,[290] and most other actuarial

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[288] Ibid., at 400 attributing this statement to Hare "The Hare PCL-R: Some Issues Concerning its Use and Misuse", at 99.
[289] Hare "The Hare PCL-R: Some Issues Concerning its Use and Misuse" at 99. See J.F. Hemphill and R.D. Hare "Some Misconceptions About The Hare PCL-R and Risk Assessment: A Reply to Gendreau, Goggin, and Smith" 31.2 *Crim Justice Behav* 203-243, at 204.
[290] Hart "Psychopathy and Risk for Violence", at 368.

instruments.[291] It is foreseeable that an improvement in predictive validity will occur when the PCL-R is used in conjunction with other assessment instruments, such as the VRAG, the LSI-R and the HCR-20. Granted, this improvement may be minimal, due to the overlap between some of the predictor items. However, the PCL-R does add items that are not included in other risk instruments, thereby introducing new information that may enhance validity. "The PCL-R does not compete with these instruments; it provides unique information that might help clinicians to understand better the offenders and patients with whom they work."[292]

3.6. A Look to the Future

Having established the predictive validity and reliability of the construct of psychopathy in relation to crime and violence, it is crucial to consider how to constructively utilize these findings. These findings are relevant for both criminal justice and mental health management strategies. Neither the complete rejection nor the unqualified and exclusive reliance on the Psychopathy Checklist for management decisions are desirable. The significance of the correlations between the construct of psychopathy and violent and general criminality demand attention and cannot be ignored. Psychopathy cannot only help us understand persistent offenders better, but informs us as to their management risks and needs. Furthermore, the validity and reliability of some of the actuarial risk assessment instruments discussed above indicates they are of value in risk assessment as well as management. Specifically, the PCL-R in combination with more dynamic risk and need factors could boost the achievements of current management programs. Whenever using risk assessment procedures, however, a certain

[291] Hemphill *et al.*, "Psychopathy and Recidivism: A Review" at 157-158.
[292] Hemphill and Hare "Some Misconceptions About The Hare PCL-R and Risk Assessment: A Reply to Gendreau, Goggin, and Smith", at 207.

degree of imprecision exists and must be borne in mind. The rate of false-positives and negatives that seems impossible to eliminate may seem minor when considering statistics, but it is far from negligible when we remember that individuals' liberty is involved. Prior to contending with the ethical issues of risk assessment, one ought to consider the management choice of primary and secondary prevention.

3.6.1. Primary Prevention

Primary prevention refers here to the application of risk assessment to anticipatory avoidance schemes. To be precise, it entails the identification of youth at risk of becoming psychopaths, and preventing or impeding this decline into criminality through targeted intervention. Thus, unlike the previous discussion, the criterion here is adult psychopathy, rather than criminal behaviour and recidivism. Due to the significance of the correlation between psychopathy and criminality, attempting to predict the occurrence of psychopathy accurately enough to nip it in the bud is worthwhile. Following that, one might ask whether intervention is attainable.

Theoretically, and in view of the unknown aetiology of psychopathy, since it is a personality disorder and since the human personality develops gradually before attaining a resolved state, it is possible that the direction the personality takes in youth may be diverted.[293] A personality disorder is in essence a developmental maladjustment of character, described in terms of pathological expression of personality traits. The construct of psychopathy does not exhibit cognitive defects; rather its defects are centred in the sphere of emotive disruptions. Emotions, in turn, are also a

[293] See for example P. Cramer *The Development of Defence Mechanisms: Theory, Research and Assessment* (Springer-Verlag 1991); Cramer "Personality, Personality Disorders, and Defence Mechanisms".

developmental dynamic, ranging from infancy to maturity, irrespective of its origins, be it nature or nurture. Consequently, any obstacles to this growth during childhood are a potential destructive force challenging emotional maturity later on in life. A further predictor of adult maladjustment is to be found in the personality traits of these individuals, as well as their unruly behaviour. Hence, warning signs of this arrested development are likely to be found in youth, possibly enabling early interventional remedies.

Childhood personality traits and later personality disorders have been analysed, and concluded with the finding that the two are not distinct.[294] Conceptually as well as empirically, traits such as impulsivity,[295] callousness, lack of empathy and guilt, and exploitative and unrestrained behaviour,[296] are associated with conduct problems and psychopathic features. Indeed, in addition to evidence of the correlation between psychopathic traits in adolescents and criminality presented above, conduct disorders at age eighteen appear to be significantly predictive of the incidence of antisocial personality disorder at age twenty-one.[297] However, the over-inclusive nature of conduct disorders, diagnosed by the DSM-IV, has been stressed. Undeniably, the criteria for conduct disorders are based principally on antisocial behaviours, rather than more complex personality traits. Therefore, it is not surprising that although all psychopathic young offenders meet the conduct disorders criteria, only 30% of conduct disordered young offenders

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[294] R.F. Krueger "Personality Traits in Late Adolescence Predict Mental Disorders in Early Adulthood: A Prospective-Epidemiological Study" 67.1 *J. Pers.* 39-65, at 60.

[295] But not sensation-seeking, see M J. Vitacco and R. Rogers "Predictors of Adolescent Psychopathy: The Role of Impulsivity, Hyperactivity, and Sensation Seeking" 29.4 *J Am Acad Psychiat* 374-382, at 379.

[296] P J. Frick *et al.,* "Callous-Unemotional Traits and Conduct Problems in the Prediction of Conduct Problem Severity, Aggression, and Self-Report of Delinquency" 31.4 *J Abnorm Child Psych* 457-470, at 463-466.

[297] Krueger "Personality Traits in Late Adolescence Predict Mental Disorders in Early Adulthood: A Prospective-Epidemiological Study", at 53. Conduct disorders (DSM-IV code 312.8) are usually first diagnosed in infancy, childhood, or adolescence, but are not precluded from being diagnosed in adulthood, especially early adulthood.

met the criteria for psychopathy.[298] Thus, only a third of children or adolescents with conduct disorders develop psychopathy in adulthood. There are, however, means to narrow the assessment, by focusing on certain personality traits in combination with conduct disorders that may enhance predictive validity.[299] Furthermore, a new screening device applicable to children has emerged, advancing research in the area.

The Antisocial Processes Screening Device[300] was developed to measure aspects of psychopathy in children. The device has retained the two-factor construct of the disorder, but the content was altered to fit younger subjects. Unlike the adult and juvenile versions, the APSD is not completed via a semi-structured interview. Rather, observations of adults in a position of authority over the child, parent and teacher, score the 20 items of the APSD.[301] Items on the APSD are divided into two factors. The first factor relates to callous and unemotional items, correlated with adult items such as lack of guilt and empathy and shallow emotions. This factor includes being unconcerned about schoolwork, not feeling bad or guilty, emotions seeming shallow and insincere, not showing emotions, charming behaviour appearing insincere, and being unconcerned about others' feelings. The second factor relates to poor impulse control and conduct problems, revealed in bragging about accomplishments, becoming angry when corrected,

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[298] Minister of the Solicitor General of Canada *Psychopathy and Young Offenders: Prevalence, Family Background, and Violence* (1995)

[299] See P J. Frick *et al.*, "Applying the Concept of Psychopathy to Children: Implications for the Assessment of Antisocial Youth" in C.B. Gacono (ed) *The Clinical and Forensic Assessment of Psychopathy: A Practitioner's Guide* (Lawrence Erlbaum Associates Publishers 2000), at 12-14; C.T. Barry *et al.*, "The Importance of Callous-Unemotional Traits for Extending the Concept of Psychopathy to Children" 109 J. *Abnorm. Psychol.* 335-340, at 337-338.

[300] P J. Frick and R.D. Hare *The Antisocial Process Screening Device* (MHS 2001). Formerly called the Psychopathy Screening Device (PSD).

[301] There is also a self-report version of the instrument, see A.A. Caputo *et al.*, "Family Violence and Juvenile Sex Offending: The Potential Mediating Role of Psychopathic Traits and Negative Attitudes Toward Women" 26.3 *Crim Justice Behav* 338-356. However, there does not appear to be a statistically significant correlation between APSD Self-Report and APSD Staff Rating items, see D.C. Murrie and D.G. Cornell "Psychopathy Screening of Incarcerated Juveniles: A Comparison of Measures" 14.4 *Psychol Assessment* 390-396, at 393.

thinking one is more important than others, acting without thinking of the consequences, blaming others for one's own mistakes, making fun of others, engaging in risky or dangerous activities, engaging in illegal activities, failing to keep the same friends, and getting easily bored. The factor structure of the APSD is different from that of the adult and juvenile versions.[302] Indeed, the correlation between the PCL:YV and the APSD was low.[303] This could be due to the fact that the scorers of the APSD are parents and teachers, which may produce greater disparity between raters.[304]

However, recent neuropsychological studies using a version of the APSD[305] found some differences between children with psychopathic tendencies and children without such tendencies. Children scoring high on the APSD made significantly more errors in processing emotions, than other children.[306] The children were shown pictures of facial expressions and were asked to say out loud which emotions were being shown as soon as they recognised the emotion.[307] Children with psychopathic tendencies failed to correctly distinguish both fearful and sad expressions more often than did other children.[308] In another study, children were shown four decks of cards on a computer screen, and were asked to click on cards. Choosing cards from the first two packs generated a $100 reward displayed on the computer. The other two packs produced a $50 reward.[309] Children with psychopathic tendencies were significantly more likely than the other children to choose cards

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[302] P J. Frick *et al.,* "Psychopathy and Conduct Problems in Children" 103 J. *Abnorm. Psychol.* 700-707, at 704.
[303] Murrie and Cornell "Psychopathy Screening of Incarcerated Juveniles: A Comparison of Measures" At 395.
[304] Ibid., at 395.
[305] The Psychopathy Screening Device.
[306] R J.R. Blair *et al.,* "A Selective Impairment in the Processing of Sad and Fearful Expressions in Children With Psychopathic Tendencies" 29.6 *J Abnorm Child Psych* 491-498, at 495-496.
[307] Ibid., at 494.
[308] Ibid., at 496.
[309] R J.R. Blair *et al.,* "Somatic Markers and Response Reversal: Is There Orbitofrontal Cortex Dysfunction in Boys With Psychopathic Tendencies?" Ibid. 499-511, at 503.

from the less favorable A and B packs.[310] Children with psychopathic tendencies also failed to learn to avoid those packs of cards, whereas the other children did.[311] These neuropsychological differences may extend themselves into adulthood, and thus the link between psychopathic tendencies in young children and future conduct problems and even psychopathy may prove stronger.[312] Indeed the APSD is in its early stages,[313] and much research ought to be done before widespread use of this instrument is recommended. Regardless of the current problems, though, this avenue should continue to be explored, as understanding the development of psychopathy and criminality is essential and may shape more effective intervention.

3.6.2. Secondary Prevention

There has been a move in academic circles from the long-term crime reduction, such as reformation, towards more immediate prevention, such as pre-emptive detention and selective incapacitation. Secondary prevention shall here refer to preventative detention or increased incarceration on the basis of degree of risk of serious recidivism. Secondary prevention is more attractive than primary prevention for a number of reasons. First, results of secondary prevention are seen much sooner than those of primary prevention. In order to perceive the results of primary prevention, one needs to focus on the bigger picture, observing generations before being able to conclude whether the intervention was successful. With secondary prevention, however, the effects are felt

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[310] Ibid., at 504-505.
[311] Ibid., at 504-505. Note that there were no significant differences between the groups of children in relation to an Intra/Extradimensional Set Shift (ID/ED) task.
[312] Indeed, children scoring high on the APSD distinguished between moral and conventional contraventions less than did low scoring children – L. Fisher and R J.R. Blair "Cognitive Impairment and Its Relationship to Psychopathic Tendencies in Children with Emotional and Behavioural Difficulties" 26. Ibid. 511-519, at 516.
[313] See discussion in Frick *et al.*, "Applying the Concept of Psychopathy to Children: Implications for the Assessment of Antisocial Youth", at 19-21.

instantaneously. Furthermore, at least in the foreseeable future, secondary prevention is less costly, or at least less obviously so. The surface costs of secondary prevention are the costs of detention. The costs of primary prevention appear to be higher as they require agencies other than the criminal justice and mental health systems to get involved. Local educational authorities, teachers, parents, social workers and more would have to take greater responsibility for the future of children at risk. The cost to the public sense of safety is also larger for primary prevention than it is for secondary prevention. It is thus clear why the latter is growing in popularity. That does not imply, however, that support for the former is vanishing. Indeed the growing research interest in developing risk assessment instruments for youth described above suggests that attempts to minimise the occurrence of adult psychopathy are on the rise. The two following chapters shall consider the more immediate solution of secondary prevention at greater length. Both mental health detention and criminal justice indeterminate sentences targeting risky individuals are analysed. Before concluding and proceeding with these detention schemes, however, the ethical issues of risk assessment must be considered.

Even the most successful risk assessment practices bear a certain amount of imprecision. Errors ensue regardless of how refined the process is. Ideally, we would be able to answer the following three questions with assurance of accuracy. First, what is the likelihood that the subject will recidivate? Second, what is the severity or gravity of the potential harm? Third, what is the quality of the data on which the assessment is based? For ideal accuracy, probability of behaviour occurring, magnitude of harm and quality of prediction ought to be very high. Unfortunately, current knowledge has not reached such adequately high levels of accuracy, and a certain rate of false-positives and false-negatives are inherent in the process. Continuing research endeavours improve risk assessment

procedures by minimising error rates, recognising that zero errors may never transpire.

False-positives are a serious problem in risk assessment of any kind, but more so considering the potential negative consequences of classifying one as a high risk of recidivism. The status and liberty of that individual is threatened by stigma and impending management. False-negatives are another serious problem of risk assessment procedures. Classifying certain individuals as low risk bears the danger that they will re-offend. Errors of this type endanger the public, as well as the reputation of both risk assessment experts and the whole discipline and methodology. The trust in decisions made following risk assessment would significantly diminish if individuals who are released re-offend.

Here we enter the realm of normative values.[314] Risk assessment by definition involves judging certain behaviours, risks or harms as unacceptable, while others are left unaffected. Society's perception of behaviour as conventional and unconventional is rather dynamic. The acceptability of behaviour changes over time. Certain activities that are now seen as unproblematic and acceptable may have been considered risky and dangerous at other times. Consider, for example, the changing attitudes towards sexual behaviour. Certain sexual behaviour, which at one time was deemed so deplorable it was criminalized, is now lawful. Consensual buggery between adults, a crime in England and Wales[315] until quite recently,[316] effectively criminalized and stigmatised homosexual, although not exclusively. Nowadays, however, adult and consensual buggery is generally accepted.

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[314] For discussion of the normative elements of risk assessment in relation to carcinogenics, see C.F. Cranor "The Normative Nature of Risk Assessment: Features and Possibilities" 8 *Risk* 123-136.
[315] Section 12 of Sexual Offences Act 1956: "It is an offence for a person to commit buggery with another person or with an animal."
[316] When it was abolished, by Schedule 4, Section 93(1) of Sexual Offences Act 2003.

Furthermore, the normative influence on risk assessment extends to the significance of the costs of minimising risks. Not only are risks deemed acceptable or not based on the normative value society assigns them, but the estimated normative costs of reducing risks also influence the tolerability of risks. Consider driving. Driving is a dangerous activity. On Britain's roads in 2003, 3,508 people were killed and 33,707 were seriously injured.[317] There were 214,030 road accidents involving personal injury in 2003, of which 32,160 involved death or serious injury.[318] The risks of injury as a result of driving are numerous, including such factors as eating, drinking, talking on the phone, changing a channel on the radio, drowsiness, drunkenness, lack of experience, speeding etc. Minimising the risks of driving is possible using measures such as lowering speed limits considerably, requiring all passengers to wear seatbelts and helmets, demanding a certain level of structural car safety for all cars, annually testing all drivers for aptitude, improving all roads, etc. These costs, however, are seen as unacceptably high. Granted, certain safeguards are taken, such as wearing seatbelts and limiting speed, but these are minimal. Precautions that are capable of significantly reducing road casualties are considered too severe to endure. The financial cost alone of these safeguards would be enormous, but there are also those precautions that are simply a nuisance. Wearing a helmet may be endured on motorbikes and bicycles, but the idea of people wearing helmets in their cars is farfetched. It is clear, however, that helmets would increase safety. Nonetheless, convenience is seen as a more pressing need than safety in this case. And so driving becomes a risk most people are willing to accept into their lives.

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[317] National Statistics *Road Casualties in Great Britain: Main Results: 2003* (Statistics Bulletin (04) 30 2004), at 5.

[318] Ibid., at 5. This compares with 1,048 deaths recorded as homicide by the police in 2002-03: Home Office *Crime in England and Wales 2002/2003* (07/03 2003) Chapter 4, at 81.

So it is clear that a balance needs to be struck between the normative value of the risk and the normative value of the cost of minimising that risk. The emphasis is thus not on the rate of errors; rather it is on the meaning attached to the consequences of making these errors. Consider the criminal law's attitude toward convicting the innocent. The adage 'innocent until proven guilty' suggests that wrongful convictions are considered more worrisome than acquittals of the guilty. Thus safeguards are taken to avoid wrongful convictions such as intensifying the burden of proof of the prosecution and lowering that of the accused. Other procedural rules of evidence are also aimed at minimising the occurrence of such mistakes, as well as limitations on police powers. Yet again, it is not only recognized that eliminating the risk of wrongful convictions is impossible, but also that substantially reducing the risk may be too costly. To further minimise the risk of wrongful convictions we would need to raise the certainty required before conviction above 'beyond reasonable doubt'. However, doing so would simultaneously increase the chance of guilty people being acquitted. That is a price society is not willing to pay. A balance is thus struck.

One ought to attempt a balancing of risks and costs in relation to risk assessment of recidivism and observe what such balancing might conclude. If we extend the values of the criminal law to the field of risk assessment, false-negatives will then be more tolerable than false-positives. Indeed, support for this preference exists in the research literature on psychopathy. The preferred cut-off scores for a classification of psychopathy minimise the rate of false-positives while increasing the rate of false-negatives.[319] If we lower the cut-off score for psychopathy from 37[320] to 30, we would raise the number of individuals classified as psychopaths, and lower the rate of false-

[319] Salekin *et al.*, "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness", at 207.
[320] As recommended for risk assessment, see Ibid., at 207.

of false-negatives. If we raise the cut-off score to 40, however, there will be fewer individuals classified as psychopaths, and therefore less false-positives. This, however, would empty the concept of psychopathy of meaning. The base rate would be so low measuring it would be unfeasible. Thus it is clear that minimising both errors to an acceptably low degree is not a viable option.[321]

So what are the costs of these errors? False-negatives impair the public's feeling of safety. When the public finds out that a crime has been committed by an individual who was released from custody, there is a general feeling of anger and bitterness against those who failed to prevent him from harming another person. Consider the case of Michael Stone who was known to the mental health services before he found to have murdered Lin and Megan Russell in 1996.[322] Two years before the murders Stone was diagnosed with a severe personality disorder, considered both potentially dangerous and untreatable. The Mental Health Act 1983 did not permit his detention because of his untreatable status. The public reacted with both panic and anger, putting pressure on authorities to explain how it happened, and prevent it from happening again. The government responded with a Home Affairs Committee report on the management of dangerous people with severe personality disorders,[323] and later with the Draft Mental Health Bill.[324] These documents proposed changes to the law to enable the detention of people suffering from untreatable personality disorders by removing the treatability requirement existing in the Mental Health Act 1983.[325] The US has seen law suits against mental health

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[321] Cranor "The Normative Nature of Risk Assessment: Features and Possibilities" at 127.
[322] R *v Stone (Michael John)* (2001) EWCA Crim 297 (CA).
[323] House of Commons *Managing Dangerous People with Severe Personality Disorder* (2000).
[324] Draft Mental Health Bill 2002.
[325] The Mental Health Act, section 3(2)(b).

professionals resulting in a duty to warn potential victims of individuals posing an impending danger.[326]

Clearly, creating a system that is infallible at preventing risky individuals from hurting others is impossible. There will always be individuals who fall between the cracks for whatever reason. One way of reducing the occurrence of such events is by realising that a risk assessment result of low-risk does not mean an individual will not recidivate. Indeed, individuals who score low on the PCL-R, for example, may nevertheless present risk of re-offending. Thus, employing the PCL-R along with a number of actuarial risk assessment tools will limit the probability of false-negatives. Additionally, understanding the complexity of risk assessment would enable decision-makers to make management decisions that minimise the likelihood of inadequately supervising an individual who may pose risk. Clearly, such safeguards are expensive and time consuming and would likely be impractical considering the limited resources available to mental health system.

It is hereby contended that since the effects of false-negatives are potential rather than real, they are to be considered the lesser evil. When deeming individuals low-risk, one is not saying they will not recidivate. Rather, one is saying that they present a low risk of re-offending. A low risk of recidivism means that the probability of that person re-offending is small, not zero. Such modest probabilities do not merit the costs of reducing them further. Healthy individuals with few or no risk factors do commit crimes. Indeed, it is people with "normal" psychological profile who commit the majority of crimes, by making bad choices. Eliminating criminality is impossible. Detaining individuals who pose low risk of recidivism is both impractical and unethical. Practically speaking, detaining low-risk individuals would cause detention centres to overload and the system to collapse. Ethically, robbing an

[326] *Tarasoff v Regents of University of California.*

individual of their liberty by detaining them is unjustified when the risk of them harming anyone is low. The cost of detention is for that individual real, whereas the cost of safety for the public is potential at best. Therefore, the injury caused by detaining low-risk individuals is unjustified in light of the minimal and latent risk of harm.

The costs of false-positives are therefore to be considered higher than the costs of false-negatives. A recent meta-analysis found 41% of non-violent offenders misclassified as violent on the basis of the PCL-R.[327] There are two likely consequences of such classifying someone as posing high risk, namely stigma and possible detention. When the classification is incorrect and the individual does not recidivate, both stigma and detention are unjustified. Unfortunately, the realisation of the wrongfulness of the classification is retrospective transpiring after the management decision is made. In the interim, the individual's liberty is restricted, and the stigma of posing risk of harm to others remains with him interminably.

Stigma is an idea not to be taken lightly, especially when it is wrongfully applied. The concept of stigma originated in Ancient Greece and referred to physical signs revealing a negative feature of the carrier.[328] The modern meaning of the term has extended beyond the physical into a more abstract shaming connotation.[329] Stigmatising an individual as risky is acutely discrediting. It marginalizes the person, making it easier for society to ostracise them. This shaming process causes the individual's sense of self to erode. The stigma filters through one's view of self, tainting one's sense of worth. The risk of the stigma becoming a self-fulfilling prophecy is grave. Stigmatised individuals "experience status loss

[327] Salekin *et al.*, "A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness" at 211.
[328] E. Goffman *Stigma: Note on the Management of Spoiled Identity* (Simon & Schuster 1963), at 1.
[329] Ibid., at 1-2.

and discrimination that lead to unequal outcomes."[330] Treating individuals as risk objectifies them, thereby shrinking their humanity and individuality.[331] The isolation that ensues produces a sense of hopelessness,[332] which in turn might lead to a-social and perhaps even antisocial behaviour. The burden of stigma creates an expectation of being treated in a certain stigma related way. The expectation of such treatment may cause the stigmatised individual to act defensively and perhaps aggressively.[333] Whether stigma acts as a self-fulfilling prophecy or not does not lessen its destructive effects. The stigma of posing risk of harm to others attaches itself to the individual for a long time, irrespective of that person's behaviour. An individual labelled as risky or dangerous may appear peaceful, but to the observer who is aware of the stigma, that peacefulness is merely the quiet before the storm. The serene behaviour of a person deemed risky would appear eerie, only serving to enhance to appearance of dangerousness. Hence, it is submitted that wrongfully stigmatising individuals as posing high risk of recidivism is harmful to the individuals themselves but also to others who might suffer from the indirect consequences of the stigma.

The ethical questions in relation to detention shall be explored in more detail in the following chapters dealing specifically with mental health and criminal justice management of psychopathic offenders. For now, it is worth bearing in mind that liberty and security may be at odds at times.[334] The public wish for safe living appears to be at odds with the right of individuals to liberty. The end result of false negatives may be the increased threat of victimisation in the community, but the emphasis should be on the

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330 B.G. Link and J.C. Phelan "On Stigma and Its Public Health Implications" (*Stigma and Global Health: Developing a Research Agenda* 2001).
331 See L.M. Coleman "Stigma: An Enigma Demystified" in L J. Davis (ed) *The Disability Studies Reader* (Routledge 1997), at 221.
332 See *Mental Health: A Report of the Surgeon General* (1999)chapter 1.
333 See Link and Phelan "On Stigma and Its Public Health Implications"
334 S J. Morse "Neither Desert Nor Disease" 5 *Legal Theory* 265-309, "The desire to be safe ultimately conflicts with and complements the desire to be free".

potentiality of that victimisation. Our legal system is geared to protect the innocent against unjustified violations of liberties. Since the violations against those wrongly assessed as risky is actual, rather than potential, risk assessment procedures and consequential management decisions ought to be geared at minimising false-positives, even at the expense of the rate of false-negatives.

3.7. Conclusion

Though risk assessment processes fail to achieve perfect predictions, they still serve to support management decisions in the criminal justice and mental health systems. Psychopathy, as diagnosed by the PCL-R and its allied instruments, has been shown to be intimately associated with criminality, both general and violent. The significant correlation between Psychopathy Checklist scores and criminality suggest that ignoring the psychopathy construct in risk assessment and management processes is unwise. Psychopaths present a unique predicament for both mental health and criminal justice systems. The nature of their criminality is distinct from that of the majority of offenders. Therefore, established theories of criminality fail to explain the antisocial behaviour of psychopaths. The Psychopathy Checklist not only enhances our understanding of the distinctive nature of psychopathic criminality, but enhances our ability to assess risk of recidivism. The construct of psychopathy also enables us to explore the origins of the personality disorder by focusing of psychopathic tendencies in youths. Thus, the significance of the construct is palpable. It is hereby proposed that the construct of psychopathy based on the Psychopathy Checklist be utilised in as much as practically possible in the assessment of future recidivism of prison inmates as well as mentally disordered individuals in both forensic and civil psychiatric institutions.

CHAPTER FOUR: MENTAL HEALTH MANAGEMENT

4.1. Introduction

Psychopathic individuals pose a significant risk of institutional misbehaviour and criminality. Giving them unrestricted freedom and opportunity to disrupt the lives of others would be unacceptable to the general public. Therefore it is clear that some form of management is necessary to either minimise or prevent the incidence rate of psychopathic misbehaviour. The question is therefore what kind of management should be favoured. The main two alternatives exist in either the criminal justice system or the mental health system. This chapter shall focus on mental health management options.

Psychopathy is a personality disorder castrating moral agency. Therefore it logically follows that mental health management may be a more appropriate management avenue than a criminal justice one. This chapter shall analyse the mental health management option for psychopathic individuals under the Mental Health Act 1983. The Draft Mental Health Bill 2002 shall also be examined and critiqued. Evaluation of the advantages and disadvantage of existing mental health management options shall be made with the conclusion that, despite its limitations, such management is the preferable to criminal justice management. Following such conclusion, mental health legislation will be examined for wanted reform. This will include the present Mental Health Act 1983 and the Draft Mental Health Bill 2002.

The established status of psychopathy as a clinical mental disorder affecting moral agency gives rise to two fundamental arguments supporting mental health management. First, its status as a mental disorder is in itself a case for mental health management. Historically and legally the system has attempted to divert mentally

disordered individuals from the standard administration of order and justice.[1] Whether for reasons of exclusion or rehabilitation, mentally disordered individuals have customarily been separated from society and usually confined in specially commissioned institutions.[2] The mentally disordered were seen as unproductive and therefore a hindrance to economic growth. As a result, they became a social nuisance, aimlessly wondering the streets, unemployed and idle. Their consequent detention eased the social inconvenience mental disorder created as well as enabling the controlled employment of the confined. Modern ideas of human dignity, autonomy and rights, as well as development of medical and scientific knowledge, led to a greater emphasis on the rehabilitation and treatment of the mentally disordered. The mentally disordered were beginning to be seen as ill, rather than unruly, disordered rather than disorderly. As such, their status demanded treatment rather than punishment. Punishment is seen as additionally inappropriate for the mentally ill due to their perceived lack of control over their mental disorder. Thus, they need help rather than condemnation. The general aversion towards the disorder of psychopathy and its bearers[3] ought not to prevent us from recognising their status as mentally disordered and treating them appropriately.

Second, the inadequacy of the moral agency of full-fledged psychopaths demands that we do not hold them blameworthy for their actions. The idea of legal insanity is based on the notion that mentally ill individuals are not responsible for their behaviour. As previously contended, this notion should extend to psychopathy. Therefore, we are not justified in holding psychopaths blameworthy

[1] See J.M. Laing *Care or Custody? Mentally Disordered Offenders in the Criminal Justice System* (OUP 2000), especially chapters 1 and 2. See also N. Morris "The Criminal Responsibility of the Mentally Ill" 33 *Syracuse L Rev* 477.
[2] For a genealogy of the treatment of mental disorder in society, see M. Foucault *Madness and Civilization – A History of Insanity in the Age of Reason* (Routledge Classics 2002).
[3] See G. Lewis and L. Appleby "Personality Disorder: The Patients Psychiatrists Dislike" 153.1 *Brit J Psychiat* 44-49.

for their immoral or antisocial behaviour, as they are incapable of being motivated by moral reasons. Then again, releasing them into society without attempting to rehabilitate them is unwise.

In this chapter, it is suggested that mental health legislation ought to consider PCL psychopathy, enabling the assessment and treatment of psychopathy under mental health legislation. In order to demonstrate the value of accounting for psychopathy, mental health legislation shall be analysed and critiqued. First, the relevant provisions of the Mental Health Act 1983 shall be elucidated and appraised. The legal category of psychopathic disorder shall be explored and its limitations shall be made clear, to the effect that PCL psychopathy outperforms it. Next current conditions for admission into treatment shall be discussed, with ensuing examination of the treatability requirement affecting individuals categorised under psychopathic disorder. Assessment of risk requisite for psychopathic disorder to fulfil entry conditions shall follow. Lastly, discharge stipulations shall be looked at, drawing attention to the issue of the burden of proof. Subsequently, the relevant provisions of the Draft Mental Health Bill 2002 shall be examined. Once more, altered provisions pertinent to psychopathic disorder shall be explored, followed by proposed changes relating to entry. Intended amendments to the treatability requirement shall be discussed next, and compared to current provisions. Psychiatric cooperation is germane to whether the Draft Mental Health Bill will become law and if so whether it would be beneficial. Wrapping up the discussion of the Draft Mental Health Bill shall be the issue of compatibility with the European Convention on Human Rights as required by the Human Rights Act 1998. The analysis of both Mental Health Act 1983 and Draft Mental Health Bill shall proceed to strengthen the argument for the inclusion of psychopathy in mental health legislation and practices.

4.2. The Mental Health Act 1983

The Mental Health Act 1983 is a reformed version of the Mental Health Act 1959, presenting a more legalised approach to mental health management. The reform of the 1959 Act was initiated as a result of changes in public attitudes as well as mental health practices. Preferences changed: voluntary treatment replaced involuntary treatment, community treatment replaced hospital treatment, and self-determination and personal responsibility became important values. The 1983 Act limited the use of compulsory powers by introducing a treatability requirement along with additionally stringent safeguards for patients' rights. These safeguards limited the availability of involuntary confinement to those who presented acute mental health problems and risk to themselves or others.[4]

4.2.1. Psychopathic Disorder

The 1983 Act provides special arrangements for the treatment of those suffering from a psychopathic disorder. Following assessment,[5] and in relation to an application for treatment, the 1983 Act makes a distinction between the varieties of existing mental disorders.[6] Vis-à-vis patients diagnosed with a psychopathic disorder, treatment must be "likely to alleviate or prevent a deterioration"[7] of the disorder. This is known as the 'treatability test'.[8]

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[4] See The Mental Health Act, section 2(2)(b) requiring that the assessment occur if detention is in the patient's interests of health or safety or the protection of others.

[5] Which is applicable to psychopaths in the same way as it is to other mentally disordered individuals. See Ibid., section 2(2).

[6] Namely, mental illness, severe mental impairment, psychopathic disorder, and mental impairment, see Ibid., section 1(2).

[7] Ibid., section 3(2)(b).

[8] Discussed below.

The statutory definition of mental disorder includes a specific definition for psychopathic disorder.[9] It is important to note at this stage that the legal category of psychopathic disorder under the MHA is not identical as the diagnosis of psychopathy based on the Psychopathy Checklist. The legal paradigm dealt with here shall therefore be referred to as 'psychopathic disorder' or 'legal psychopath', rather than psychopathy.

Psychopathic disorder is defined as "a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned".[10] Impairment of intelligence is irrelevant for a finding of psychopathic disorder, indicating that the disorder, for the purposes of the MHA, is not necessarily associated with cognitive disabilities. Essentially it ensures that psychopathic disorder is not inferred solely from impaired intelligence. Furthermore, it is specified that a psychopathic disorder shall not be assumed "by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs."[11] This means that a designation of psychopathic disorder must be based on evidence independent of such manifestations. This subsection has been interpreted to prevent one from being deemed psychopathically disordered solely due to such manifestations that are unrelated to the disorder.[12] Therefore, detention is not prevented if the psychopathic disorder manifests itself in sexual deviancy, promiscuity or substance

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[9] The Mental Health Act, section 1(2).
[10] Ibid., section 1(2).
[11] Ibid., section 1(3).
[12] See R.M. Jones *Mental Health Act Manual* (8th Sweet & Maxwell 2003), at 18, discussing sexual deviancy and the Scottish case *W (a Patient) v Secretary of State for Scotland* (1999) SLT 640 (Inner House), at 644, Lord McCluskey said "a person who is suffering from mental disorder, ..., may manifest that conduct in the field of his deviancy, for example in relation to his sexual contacts with young children.... would be treated as suffering from mental disorder by reason of his psychopathic condition manifested by such conduct and not "only" by reason of the deviancy."

dependence.[13] However, the distinction between behavioural manifestation of psychopathic disorder and a designation of psychopathic disorder solely due to such manifestations is difficult to make. This is especially so because the definition of the disorder is fundamentally behavioural.

The focus of the legal definition of psychopathic disorder is on antisocial behaviour, rather than internal factors such as distress or impaired functioning, which are more typical of other mental disorders, such as schizophrenia.[14] It does not specify any other maladjusted traits that may be typical and underlying of the disorder. It does not specify any of the innate facets of the disorder, merely its behavioural manifestation. Clearly, many mental disorders become evident through behaviour, but these behaviours merely reflect underlying pathology. Furthermore, the behavioural manifestations of mental disorders other than the legal psychopathic disorder may be abnormal and malfunctioned, but are not necessarily antisocial and criminal, which is the case here. A finding of psychopathic disorder thus involves a moral and social judgment on the individual's behaviour, rather than a psychological, psychiatric or medical diagnosis.[15] According to the Mental Health Act Commission, "abnormally aggressive" behaviour represents unpredictable behaviour causing damage or distress that is either recent, persistent, or excessively severe.[16] "Seriously irresponsible" refers to behaviour posing serious or potentially serious danger, with actor's disregard for consequences.[17] Thus, 'aggressive' connotes unpredictability and damage, and 'irresponsible' indicates

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[13] Jones *Mental Health Act Manual* at 18.
[14] For a more comprehensive discussion of the significance of the distinction between disorders based on behavioural representations as opposed to those based on character traits, see previous chapter on the disorder of psychopathy.
[15] See Jones *Mental Health Act Manual* at 15; J.H. Lee "The Treatment of Psychopathic and Antisocial Personality Disorders: A Review" (1999) RAMAS: Risk Assessment, Management, and Audit Systems <http://www.ramas.co.uk/report3.pdf> (June 2), at 2.
[16] Jones *Mental Health Act Manual*, at 16, citing the Mental Health Act Commission.
[17] Ibid., at 16, citing the Mental Health Act Commission.

danger, real or potential. An emphasis on harm is apparent, although the victim of the harm it is not identified. Would damage or danger to oneself be considered sufficient for a finding of psychopathic disorder?[18] Some may think so, and indeed failure to protect oneself from abuse has been construed as 'seriously irresponsible' behaviour.[19] One may think it odd, however, considering the connotations of psychopathic disorder as posing risk to others. Whether or not harm to self is incorporated into the definition, it is fair to say that 'aggressive' and 'irresponsible' are difficult to define in a sufficiently unambiguous way. 'Abnormal' and 'serious' are even more problematic. These are relative terms, determined by the perspective of the decision-maker and definitions of 'normal' and 'minor'. A line is drawn somewhere between normally aggressive behaviour and abnormally aggressive behaviour, and between seriously and trivially irresponsible. The clarity of the definition of abnormally aggressive or seriously irresponsible behaviour depends on the clarity of the definition of normally aggressive and non-seriously irresponsible behaviour. It is asserted that the contingency of the meaning of these terms on terms that are not less ambiguous is precarious and ill advised. Ultimately, it may seem that these behaviours refer to criminality, making the definition both un-clinical and arguably circular.[20] The circularity of the definition, according to Lady Wootton, is embodied in the following: psychopathic disorder is inferred from aggressive and irresponsible behaviour, while aggressive and irresponsible behaviour is explained by the presence of the psychopathic disorder.[21] Accordingly, the more criminal the behaviour of the individual, the more disordered, and vice versa. Accordingly, the category of psychopathic disorder is applicable mostly in criminal populations, rather than psychiatric ones. How

[18] See P. Fennell "The Beverley Lewis Case: Was the Law to Blame?" *NLJ* 1557-1558; P. Fennell "Failing Through the Legal Loopholes" *Soc Work Today* 18-20.
[19] See H. Whitworth and S. Singhal "The Use of Guardianship in Mental Handicap Services" 19 *Psych Bull* 725-727.
[20] See Wootton "Diminished Responsibility: A Layman's View", at 230-231.
[21] Ibid., at 230-231.

are we to distinguish between serious offenders who are not psychopathically disordered and those that are psychopathically disordered? Are they distinguishable? Is this disorder, according to its legal definition, clinical at all? Considering that the MHA designates medical staff as the decision-makers in relation to involuntary treatment and detention, it is up to them to diagnose individuals with psychopathic disorders. This suggests an inevitable clinical facet to the disorder. Clinicians are unlikely to detain an individual for treatment if they do not think the patient suffers from a mental disorder. However, there is considerably distrust of the definition among psychiatrists, suggesting contempt for the construct.[22] Perhaps this behavioural definition does discourage psychiatrists from offering these individuals treatment.

The definition requires that the disorder be persistent, and not be based on temporary or short-lived irresponsible or antisocial behaviour. By limiting the definition thus, it excludes behaviour related to transient drug or alcohol abuse and other passing conditions. A history of problems is thus impliedly required, which may require the diagnostician to examine the individual's childhood and current social status by way of school records, social services reports, employment stability, relationship stability etc.[23] Moreover, the definition requires a causal connection between the disorder of mind and the abnormally aggressive or irresponsible behaviour. The requisite behavioural manifestations caused by the disorder of mind need not exhibit themselves at the time of assessment. It suffices

[22] See R. Cope "A Survey of Forensic Psychiatrists' Views on Psychopathic Disorder" 4.2 *J Forensic Psychiat* 215–236, at 226.

[23] Since this is a legal, rather than a clinical, category, there is no evidence suggesting a clear and distinct methodology regarding the actual diagnosis of psychopathic disorder in NHS and prison facilities in the UK. Typically, psychiatrists rely on the DSM and ICD. See Royal College of Psychiatrists *Offenders with Personality Disorders* (Council Report CR71 1999); J. Coid "DSM-III Diagnosis in Criminal Psychopaths" 2.1 *Crim Beh Ment Health* 78-79 reported the use of the PCL-R and the DSM in a special hospital. DSM personality disorders, specifically antisocial personality disorder, requires a pattern of antisocial behaviour since adolescence. ICD dissocial personality disorder requires evidence of durable deviation with onset in late childhood. All these suggest that diagnosis requires historical background.

that the behavioural manifestations occurred in the past, so long as there is a real future risk of reoccurrence in the absence of treatment.[24]

Essentially a question of medical causation, this requires proof that a mental disorder, namely a psychopathic disorder, caused the sufferer to act in an abnormally aggressive manner. Generally speaking, the notion of causation is problematic, not only from a philosophical perspective, but from an empirical one. Confusingly, the whole process is backward looking. We begin by examining the result, then we go on to search for one or more factors we can correlate with the result and deem to be the cause. Retrospective in nature, it is difficult to negate the tainting effects of hindsight. Granted, this problem is not unique to psychopathic disorder and exists in relation to all mental disorders, but it is exceptionally problematic. Since the primary evidence for the disorder is behavioural, both at present and in the past, its motives are unclear. The Butler Committee[25] considering the "multiplicity of opinions as to the aetiology, symptoms and treatment of 'psychopathy'"[26] saw this as a ground for eliminating its use as a psychiatric category.

The Committee of Inquiry into the Personality Disorder Unit at Ashworth Hospital stated, "almost without exception it has been concluded that the concept of psychopathic disorder is confusing, difficult to define and easier to describe in terms of what it is not rather than what it is."[27] It was maintained that personality disorder was a more meaningful term for the purposes of mental health legislation, and should thus replace psychopathic disorder in a

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[24] See Jones *Mental Health Act Manual* at 17-18, referring to the decision in *R (on the application of P) v Mental Health Review Tribunal for the East Midlands and North East Regions* (2002) EWCA Civ 697 (Court of Appeal).
[25] HMSO *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244 1975).
[26] Evidently, the Butler Committee was not relying on the Hare Psychopathy Checklist when referring to 'psychopathy'; rather to psychopathic disorder.
[27] HMSO *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* (Cm 4194 1999), Executive Summary, para 6.1.2.

broad definition of mental disorder.[28] It was later proposed to employ the term 'Dangerous People with Severe Personality Disorders'.[29] The Home Office concurred, proposing policy developments for managing DSPD.[30] Until changes are made in the MHA, however, psychopathic disorder remains.[31]

The legal category of psychopathic disorder is a false entity, not representing a clinical category.[32] As such, it is a heterogeneous category composed of a variety of mental disorders and other deviations. A study of legal psychopaths[33] in special hospitals has produced corroborating results, revealing that individuals categorised as psychopathically disordered suffer from a combination of clinical disorders, with 91% of the women and 56% of the men diagnosed with borderline personality disorder.[34] A study at Ashworth Hospital found that 17% of the legal psychopaths had no traits of any personality disorder according to DSM diagnoses, while 43% suffered from a DSM antisocial personality disorder.[35] In this light, the endorsement of proposals to drop the term are not surprising, including the preference of the term 'severe personality disorder'.[36] Given that the legal category of psychopathic disorder is itself heterogeneous, there is some support for adopting a more inclusive category with boundaries wider than

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[28] *Review of the Mental Health Act 1983: Report of the Expert Committee* (1999), at 3, para 11. See also *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital*, para 6.1.8.

[29] Annex C of the *Reform of the Mental Health Act 1983: Proposals for Consultation* (Cm 4480 1999). Hereafter 'DSPD'.

[30] *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development.*

[31] Consider the removal of the term 'psychopathic disorder' in the Mental Health (Scotland) Act 1984 and the Mental Health Order 1986 in Northern Ireland.

[32] Unlike the PCL-R psychopath. See Written Evidence of Prof Ronald Blackburn, *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* Vol. II, para 12. See also Department of Health and Home Office *Working Group on Psychopathic Disorder* (1994), paras 2.2-2.3.

[33] That is, those included in the category of psychopathic disorder under The Mental Health Act.

[34] See written evidence of Dr Bridget Dolan, *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* Vol. II, para 12.

[35] See written evidence of Dr Bridget Dolan, Ibid., Vol. II.

[36] See Executive Summary, Ibid. See also *Review of the Mental Health Act 1983: Report of the Expert Committee*, paras 4.12-4.16.

those of the psychopathic disorder category. Such change of phrase would also lack the burden of uncertainty that has attached itself to psychopathic disorder. A new category would be free of the stigma and disrespect currently the problem of psychopathic disorder. It would not, however, add precision to the definition. Personality disorder diagnoses based on the DSM are often considered diagnoses of last resort and suffer from critical definitional problems themselves. Arguably, generating a more precise definition would be preferable. Consider here the disorder of psychopathy based on the Hare Psychopathy Checklist. Such a diagnoses has been shown in preceding chapters to be superior to both DSM antisocial personality disorder and the ICD dissocial personality disorder. It is also a more valid, reliable, and specific diagnosis than the legal psychopathic disorder. PCL psychopathy is a homogenous category that is higher on specificity[37] and sensitivity[38] than the alternatives. It is therefore proposed here that PCL psychopathy be evaluated either as a separate category or as part of a wider category. Whether psychopathy is assessed as part of a wider mental disorder category or separately, the weight of the disorder should be acknowledged by the mental health system. Evidence that current mental health practices indeed take psychopathy into consideration shall be presented when discussing proposals for change incorporated in the Draft Mental Health Bill 2002.

4.2.2. Entry

There are two avenues into the mental health system, civil and criminal. An individual may be sectioned due to mental disorder of such a nature or degree warranting detention either civilly or following a criminal justice process. One might expect most psychopathically disordered individuals to enter the system through

[37] Few false-positives.
[38] Few false-negatives.

the criminal justice process, but the civil route appears more popular. Between 2000 and 2001, more admissions were made in relation to psychopathic disorder under the civil route of section 3, rather than through the court or prison disposal options.[39]

A civil admission for assessment[40] is possible for a period of 28 days, during which the mental health of the patient is appraised. A social worker or a near relative of the patient may apply for assessment, supported by two medical recommendations, one of which is by a qualified psychiatrist. The grounds for assessment are twofold. First, the subsistence of a mental disorder must be of a nature or degree warranting detention, and second, detention must be needed in the interests of the patient's own health or safety or for the protection of others. This period of detention is not renewable. However, detention for assessment may be followed by detention for treatment.[41] This short-term detention for assessment has no specific limitations to psychopathic disorder and is applicable to all mentally disordered in the same manner. Thus, a psychopathically disordered person may be detained and assessed for the duration of 28 days on the basis of a relative's application and two medical corroborations.

The admission for treatment clause facilitates long-term civil detention for six months, renewable.[42] The extended duration of detention requires stricter safeguard provisions and restrictions. As before, an application for treatment is based on two medical recommendations, inter alia, in relation to the criterion of health or safety of the patient or the protection of others. However, there are

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[39] According to the *In-Patients Formally Detained in Hospitals Under the Mental Health Act 1983 and Other Legislation, England: 1990-1991 to 2000-2001* (2001/28 2001), Table 6, at 20, 54 persons were civilly detained under the category of psychopathic disorder, while 44 psychopathically disordered individuals were detained through the criminal justice diversion system.

[40] The Mental Health Act, section 2.

[41] Ibid., section 3.

[42] First for an additional period of 6 months, and then for a further period of one year, Ibid., section 20(2).

further safeguards, such as the automatic review by the Mental Health Review Tribunal at the end of 6 months.[43] An additional constraint of treatability is placed on the detention of those suffering from psychopathic disorder.[44] Hence, a psychopathically disordered person may only be detained for treatment if deemed treatable.

A further civil avenue for entry employs police officers. Officers may compulsorily relocate an individual to a place of safety if the person appears to be mentally disordered in a public place.[45] The appearance of mental disorder usually follows evidence of "threatening or bizarre behaviour".[46] Whether such behaviour satisfies the mental disorder requirement is left to the officer's discretion. A transfer to a place of safety must not extend beyond a period of 72-hours,[47] during which it shall be assessed whether the person is in need of further action. The place of safety referred to in the Act is an approved residential accommodation of the social services and may be a police station, a hospital, a mental nursing home or another suitable place.[48] Therefore, if a police officer observes an individual appearing mentally disordered in a public place, an identification of mental disorder is unnecessary at that stage and would be revealed during assessment.

The criminal route to mental health detention generally occurs during court process. Diversion is available while an accused is on remand awaiting trial.[49] The court, on the basis of evidence of mental disorder by a responsible medical practitioner, can remand

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[43] Ibid., section 68(1).
[44] And mental impairment. The issue of treatability shall be dealt with below.
[45] The Mental Health Act, section 136. A justice of the Peace may issue a warrant a police officer to enter a private place and remove a person who apparently suffers from mental disorder. This power is rarely used. The Home Secretary may also transfer a mentally disordered offender from prison to hospital.
[46] See *Report of the Committee on Mentally Abnormal Offenders* para 9.11.
[47] And shall end sooner if the person is examined and interviewed beforehand.
[48] The Mental Health Act, section 135(6).
[49] Ibid., sections 35 and 36.

an accused to hospital for a period of 28 days, renewable.[50] The purpose of such disposal is either for a report on the mental health of the accused[51] or for treatment.[52] Following a trial, an accused may plead a mental disorder defence to either diminish or negate responsibility[53] and receive an order involving psychiatric treatment instead of punishment or release. These management decisions arise at the sentencing stage. The court has a variety of disposal options to choose from, including a psychiatric probation order,[54] a hospital order,[55] a restriction order,[56] guardianship orders[57] and alternatives.

In relation to psychopathically disordered offenders, it appears that the most frequent diversion occurs while they are serving their prison sentence, rather than at the sentencing stage or beforehand. Under section 47, the Secretary of State, on the basis of evidence of two responsible medical practitioners that the prisoner is suffering from a treatable psychopathic disorder, may order a transfer to hospital for treatment, with or without restrictions.[58] According to official statistics, of the 44 psychopathically disordered offenders diverted to hospital in 2000-2001 by the courts, 31.8% were transferred from prison with restrictions under section 47.[59] 27.2% were diverted at the sentencing stage, via a hospital or guardianship order with restrictions[60] instead of imprisonment. 15.9% not yet convicted psychopathically disordered individuals remanded in custody were removed to hospital with restrictions under section 48.[61] Other psychopathically disordered persons were remanded to

[50] Ibid., sections 35(7) & 36(6) maximum time of 12 weeks in all.
[51] Ibid., section 35.
[52] Ibid., section 36.
[53] See diminished responsibility and insanity, respectively.
[54] Under Powers of Criminal Courts Act 1973, section 2.
[55] The Mental Health Act, section 37.
[56] Ibid., section 41.
[57] Ibid., section 37.
[58] Under Ibid., section 49.
[59] 14 out of 44. See the *In-Patients Formally Detained in Hospitals Under the Mental Health Act 1983 and Other Legislation, England: 1990-1991 to 2000-2001.*
[60] 12 out of 44. Under The Mental Health Act section 37.
[61] 7 individuals.

hospital instead of prison,[62] sent to hospital under a hospital order without restrictions,[63] and were otherwise diverted.[64] Thus, it would seem that diversion of psychopathically disordered offenders from the criminal justice system occurs almost equally at either sentencing stage or diversion from prison.[65]

4.2.3. Treatability

Successful application for detention of an individual with psychopathic disorder is possible only if supported by an assertion that the patient is treatable. The medical decision-maker must be satisfied that "such treatment is likely to alleviate or prevent a deterioration of his condition."[66] Theoretically, according to this condition, if one is unlikely to benefit from treatment, he does not belong in a hospital. This requirement, however, does not apply to all four categories of mental disorder under the MHA as they may nevertheless be admitted in the absence of treatability, e.g. "to tide them over a crisis."[67] The treatability requirement applies only to those with psychopathic disorder or mental impairment. "The policy of the 1983 Act in relation to patients with psychopathic disorders is treatment not containment."[68] The courts' interpretation of the treatability requirement appears to be broad. The courts appear to recognise the probability of the treatability requirement preventing detention of psychopathically disordered individuals. Therefore, they have attempted to widen the gateway into detention by construing the treatability in a relatively broad

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[62] The Mental Health Act, section 35: 1 individual = 2.2%.
[63] Ibid., section 37: 1 individual 2.2%.
[64] 9 individuals (20.4%) were disposed under Ibid., sections 38, 44, and 46, while 1 individual (2.2%) was disposed under other legislations.
[65] 31.6% diverted at sentencing stage and 31.8% removed from prison post-conviction. The rest, 36.3%, are hospitalised under section 48 pre-conviction, section 38 interim hospital orders, section 44 hospital admission instead of custody, and section 46 at Her Majesty's pleasure.
[66] The Mental Health Act, section 3(2)(b).
[67] *A Review of the Mental Health Act 1959* (Cmnd 7320 1977), para 2.40.
[68] R *v Canons Park Mental Health Review Tribunal, ex p. A* (1995) Q.B. 60 at 77 per Roch LJ when discussing the construction of section 72(1)(b)(i).

way. Despite such attempts at making entry wider, the treatability requirement remains an obstacle to the detention of psychopathic individual. The pervasive therapeutic pessimism among clinicians as to the treatability of psychopathic disorder remains a cause of refusing admission. The courts' attempts at widening the treatability test are therefore thwarted by the unwillingness of clinicians to treat psychopathically disordered individuals. The treatability test and its legal construction shall be delineated, along with a discussion of the reasons for considering psychopathic disorder to be untreatable. In fact, the pessimism in relation to treatability is not wholly defensible. Despite the lack of evidence to support an optimistic assertion regarding the treatment of psychopathy, it is, at least in part, due to the scarcity of appropriate techniques. It is possible that future research would unearth successful methods to change the behaviour of psychopaths. Nevertheless, pessimism continues to prevent the detention of individuals with psychopathic disorders and thus continues to attract criticism.

In directing tribunals in approaching the treatability test, the Court of Appeal[69] presented some guidelines. Prior to imparting the guidelines, the court said that the treatability test does not hinge on patients' willingness to cooperate.[70] This is significant considering that the psychopathically disordered individual, if he is anything like PCL psychopath, is unlikely to be enthusiastic about treatment. Essentially, lack of cooperation on behalf of the psychopathically disordered person will not prevent detention. Clearly heeding disinclination to cooperate would grant this disruptive individual the ability to manipulate the system. This is undoubtedly undesirable. However, one cannot be detained for the sole reason of being coerced into participating in treatment.[71] Therefore mere opposition to treatment is not reason for detention. Rather, what is

[69] In Ibid., at 81-82, per Roch LJ.
[70] Ibid., at 80-81, per Roch LJ, discussing the scope of the treatability test.
[71] Ibid., at 81, per Roch LJ, first principle.

necessary is the realistic expectation that treatment would be beneficial, regardless of the patient's attitude. The second principle mentioned by the court affirms the working of the section on treatability,[72] confirming that the test will be satisfied if treatment is likely to *either* alleviate *or* prevent deterioration. So the alleviation and prevention of deterioration requirements are meant to be considered as alternatives, rather than jointly. Therefore, as long as treatment is likely to prevent deterioration of the condition, namely to freeze the condition and keep it the way it was at the time of entry, detention will be authorised. The threshold is rather low, considering that the surroundings are such as to limit the freedom of the patient. Arguably, even without medical treatment, simply residing in a mental health institution stops the harm to the public and is thus beneficial. Arguably, and in light of the definition of the disorder being based on the destructive behavioural aspect of it, a tight orderly regime of rules and discipline is all that is needed to curb that behaviour. The disorder itself need not improve with treatment. The patient need not feel better, or be better able to cope with the inner forces driving him to antisocial behaviour. It is enough that the patient, so long as he is institutionalised, is not becoming a more difficult management case. Considering the House of Lords' opinion that the treatment of symptoms suffices in this context,[73] it appears as if the whole focus in relation to psychopathic disorders is to restrain the socially problematic behaviour, rather than improve the mental health of the patient.

Furthermore, it is not required that the prevention of deterioration or alleviation be certain. A likelihood of such result shall suffice.[74] Hence, detention shall be prevented only if the possibility of improvement or stay of deterioration is less than likely. Not surprisingly, the court does not elaborate on the dividing line

[72] Ibid., at 81-82.
[73] *Reid v Secretary of State for Scotland* (1999) 2 AC 512 (House of Lords), at 530-531, per Lord Hope of Craighead.
[74] *R v Canons Park Mental Health Review Tribunal, ex p. A*, at 82, third principle.

between likely and unlikely. Jones maintains that likelihood suggests a high degree of probability, and that a mere possibility is insufficient.[75] The term 'good prospect'[76] was used in relation to the likelihood of treatment ameliorating condition, as well as the opposing term of 'unlikely'[77] to alleviate or prevent deterioration of the condition. Therefore, the vagueness of the guidance on the likelihood of treatment success leaves the decision to the discretion of the medical officers. The Mental Health Review Tribunal may review their decision, although it is unlikely to take a view that is significantly different from medical recommendations.[78] The court further recognised that a deterioration of the condition is possible as an initial result of detention. Such deterioration does not rule out the satisfaction of the treatability test.[79]

The meaning of treatment in this context was elucidated by the court to include nursing, care, habilitation and rehabilitation under medical supervision.[80] Hence, if a patient is to receive nursing or care, these will suffice so long as it is under medical supervision. This is a wide but not unusual interpretation of treatment, as it follows the definition of medical treatment in the MHA.[81] This definition was further elucidated, and even widened, by the House of Lords decision in *Reid*.[82] The court held that anger management under medical supervision, which resulted in the patient being less physically aggressive, satisfied the treatability requirement. Anger management is cognitive therapy aiming to regulate anger by

[75] Jones *Mental Health Act Manual*, at 38.
[76] *Reid v Secretary of State for Scotland*, at 526, per Lord Hope of Craighead.
[77] Ibid., at 548, per Lord Hutton.
[78] Nevertheless, the tribunal is not bound to follow psychiatric opinion. See *R v London South and South West Region Mental Health Review Tribunal, ex p. Moyle* (1999) WL 1142677 (QB) per Latham J.: "It is open to a Tribunal, provided that they act rationally, to disagree with the views of any psychiatrists whose evidence is put before them."
[79] *R v Canons Park Mental Health Review Tribunal, ex p. A*, at 82, fourth principle.
[80] Ibid., at 82, fifth principle.
[81] See The Mental Health Act section 145(1): ""medical treatment" includes nursing, and also includes care, habilitation and rehabilitation under medical supervision."
[82] *Reid v Secretary of State for Scotland*, at 551-552, per Lord Hutton.

understanding it and developing less aggressive skills of coping with the anger.[83] In 2000 a new anger management programme was introduced into the UK prison service. Controlling Anger and Learning to Manage It (CALM)[84] is a Canadian cognitive behavioural programme aimed at prisoners who show signs of poor emotional control and whose offending is related to these problems. This programme has been piloted and is being implemented in prisons in England and Wales.[85] This programme is based on Rational-Emotive Behavioural therapy rather than purely cognitive therapy and may improve success rates.

Interestingly, however, psychopathic disorder may be seen as an obstacle to successful anger management.[86] Psychopathic traits, such as lack of personal distress, and failure to see that anything is wrong mean that psychopathically disordered individuals fail to recognise the anger problem they have. Other traits such as conning, lying, and superficial charm impair the ability of the individual to participate in treatment and comply with expectations.[87] Indeed there is evidence to suggest that psychopaths[88] do not benefit from traditional rehabilitation programmes.[89] Furthermore, offenders rating high on the PCL-R Factor 1, referring to psychopathic personality traits, had an increased rate of recidivism following anger management and social skills training programmes in England.[90] However, the legal category of psychopathic disorder does not rest on these

[83] Lee "The Treatment of Psychopathic and Antisocial Personality Disorders: A Review" At 13, discussing R.W. Novaco *Anger Control* (Lexington 1975).
[84] W. Winogron *et al., CALM: Controlling Anger and Learning to Manage it* (MHS 1998).
[85] Joint Prison/Probation Service Accreditation Panel *What Works: First Report from the Joint Prison/Probation Accreditation Panel: 1999-2000* (2000); Home Office, National Probation Service for England and Wales *Offending Behaviour Programmes: Cognitive Skills Booster and CALM Programmes* (05/2004 2004).
[86] K. Howells and A. Day "Readiness for Anger Management: Clinical and Theoretical Issues" 23.*Clin. Psychol. Rev.* 319-337, at 322.
[87] Ibid., at 322.
[88] Diagnosed by the Hare PCL-R.
[89] Hare *et al.*, "Psychopathy and the Predictive Validity of the PCL-R: An International Perspective", at 629-630.
[90] Ibid., at 637-639.

psychopathic traits and is a wider category that PCL psychopathy. Therefore, it is likely that these pessimistic results may not apply to psychopathic disorder, considering its heavy reliance on behavioural rather than character traits.

The therapeutic pessimism in relation to psychopathy is, however, of some relevance here as confusion between the two concepts is likely to occur. If clinicians consider psychopathic disorder and psychopathy as one and the same disorder, they are more likely to consider psychopathic disorder to be untreatable. Such confusion is liable to happen considering the general misinformation about personality disorders in general and psychopathic-related ones in particular.[91] The therapeutic pessimism in relation to psychopathy is pervasive, partly due to the frustration that dealing with psychopaths causes clinicians.[92] Typical psychopathic traits such as manipulativeness, pathological lying, impulsivity, and failure to accept responsibility for his own actions are a more than a mere nuisance in therapy. Psychopaths are generally less motivated to change their behaviour, as they fail to see the problem with continuing to behave in that manner.[93] Psychopaths usually end up in treatment due to court orders rather than their own willingness.[94] They also appear to stay in treatment for a shorter period than non-psychopaths, thereby immediately reducing the likelihood of such treatment succeeding.[95] Moreover, clinicians must trust in the patient for information about their maladies. Without sufficient openness and trust, the clinician has no way of knowing what the patient is going through and whether treatment is helpful, hindering or neutral. Psychopaths present numerous problems in this respect, as they are unresponsive in their relationships. They are non-

[91] See first chapter for discussion of interchangeable use of terms.
[92] R.T. Salekin "Psychopathy and Therapeutic Pessimism: Clinical Lore or Clinical Reality?" 22.1 *Clin. Psychol. Rev.* 79-112, at 80.
[93] J.R.P. Ogloff *et al.*, "Treating Criminal Psychopaths in a Therapeutic Community Program" 8 *Behav. Sci. Law* 181-190, at 186-187.
[94] Hare, *Without Conscience*, at 195.
[95] Ogloff *et al.*, "Treating Criminal Psychopaths in a Therapeutic Community Program", at 185.

introspective, impatient, and "highly sceptical or afraid of involved psychological analysis or interpretation."[96] The frustration that might result from all these symptoms is manifest and it is no wonder that they are often regarded as 'the patients psychiatrists like to dislike' and why the disorder is correlated with a judgment of un-treatability.[97] The therapeutic pessimism attached to it, however, is arguably baseless. A number of meta-analyses have suggested that there is no valid evidence to suggest that psychopaths are untreatable.[98] Studies showing low treatability of psychopaths suffer from serious methodological problems, such as not using adequate control groups, inconsistently measuring psychopathy, lacking clarity of treatment goal, etc.[99] Unfortunately, these methodological problems apply equally to studies suggesting the opposite, that psychopaths are treatable. We cannot say with any confidence that psychopaths are untreatable, only that hitherto the treatment programmes contending with psychopaths have failed to show success in alleviating the disorder. The only logical inference one is justified in making relates to the treatment programmes of psychopaths, rather than the treatability of psychopaths. The lack of positive evidence of treatment success has no bearing on the status of psychopathy as a treatable or untreatable disorder. One ought to bear in mind that absence of evidence is not evidence of absence. The deficiency in evidence collaborating treatment credibility does not suggest there is no treatment that is capable of alleviating the disorder. It merely suggests that we either haven't developed the

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[96] A. Ellis "The Treatment of a Psychopath with Rational-Emotive Psychotherapy" in *Reason and Emotion in Psychotherapy* (Lyle Stuart 1973), at 288.
[97] See Lewis and Appleby "Personality Disorder: The Patients Psychiatrists Dislike".
[98] J.L. Skeem *et al.,* "Psychopathy, Treatment Involvement, and Subsequent Violence Among Civil Psychiatric Patients" 26.6 *L & Hum Behav* 577-603; K. D'Silva *et al.,* "Does Treatment Really Make Psychopaths Worse? A Review of the Evidence" 18.2 *J Pers Disorders* 163-177; Salekin "Psychopathy and Therapeutic Pessimism: Clinical Lore or Clinical Reality?"; J.F. Hemphill and S.D. Hart "Motivating the Unmotivated: Psychopathy, Treatment, and Change" in M. McMurran (ed) *Motivating Offenders to Change: A Guide to Enhancing Engagement in Therapy* (Wiley 2002).
[99] Hemphill and Hart "Motivating the Unmotivated: Psychopathy, Treatment, and Change", at 198-200.

appropriate treatment programme, or we haven't utilized available treatments correctly.

Treatment programmes currently available do not specifically target psychopaths. Rather, they are general programmes aimed at offenders or mentally disordered individuals. Psychopaths represent a distinct category of personality both among offenders and non-offenders. Psychopathy is not explained by general theories of criminality. Likewise, psychopaths ought not to receive the same treatment given to non-psychopaths. Among the treatment programmes currently available, therapeutic communities are worth mentioning. The underlying principle of therapeutic communities is that residence in one is therapeutic in itself. Therapeutic communities are regulated settings enabling patients to enhance their sense of responsibility while partaking in therapeutic interventions. These communities avoid the hierarchy of most treatment programmes, developing equality between patients and staff members.[100] Condemnation and criticism are replaced by tolerance, and imposing supervision is replaced by encouraging individual and collective responsibility.[101] Therapeutic communities often consist of community meetings, staff review meetings, and 'living learning' situations.[102] Community meetings are daily gatherings where patients and staff discuss the happenings of the past twenty-four hours. Community meetings are where ideas and decisions are discussed. These meetings give patients the opportunity to participate in community affairs and overcome some of their social problems through discussions.[103] Staff review meetings directly follow community meetings, where members of

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[100] See C.Q. Hardy "Systematic Enquiry: The "Treatability Test" and Psychopathic Disorder" (2003) The Institute of Mental Health Act Practitioners <http://www.markwalton.net/mdo/Enquirypscyopath.asp>.
[101] Ibid.
[102] For historical overview of the development of therapeutic communities, see D. Kennard "From Innovation to Application: Therapeutic Communities for People with Severe Personality Disorders" in D. Kennard (ed) *An Introduction to Therapeutic Communities* (Jessica Kingsley Publishers 1998).
[103] Ibid., at 61-62.

staff discuss the exchanges made during the preceding community meeting. The interdisciplinary background of staff members in therapeutic communities make it necessary for staff to communicate and share thoughts to shed light on how to accomplish particular therapeutic aims.[104] Living learning situations take place immediately after crises occur. These provide opportunity to confront and analyse the difficulties giving rise to the earlier crisis. This involves patients and staff members sharing thoughts and feelings about the situation to enhance the understanding of all participants of the interconnections of the community.[105] A renowned therapeutic community managing personality-disordered offenders is the Grendon Underwood programme. Measuring the success rates of this programme is problematic, however, as Grendon inmates appear to pose a higher risk of reconviction than other prisoners serving similar sentences for similar offences.[106] Comparisons of success rates of the Grendon therapeutic community with other programmes do not measure comparable groups of offenders. Research evaluating the success and failure rates of the Grendon programme compared with programmes managing similar groups of offenders is therefore indispensable. Research is currently underway in both Canada and England assessing novel treatment programmes specifically targeting psychopaths.[107] Results from these pilot studies would help to educate us regarding the type of treatment that works with psychopaths. The general lack of reliable evidence as to the treatability of psychopaths ought not to discourage us from undertaking the project of treatment. Rather, more research and knowledge would certainly improve their and our prospects.

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[104] Ibid., at 62.
[105] Ibid., at 62.
[106] Home Office Research and Statistics Directorate *A Reconviction Study of HMP Grendon Therapeutic Community* (53 1997).
[107] See forthcoming S. Wong and R.D. Hare *The Program Guidelines for the Institutional Treatment of Violent Psychopaths* (MHS In Press); Home Office *et al.*, "DSPD Programme" <http://www.dspdprogramme.gov.uk>.

Bearing in mind the dearth of evidence demonstrating successful treatment of psychopathic disorder, the wide interpretation by the courts is understandable. A stricter interpretation of the treatability requirement would prevent almost all psychopathically disordered individuals from being civilly detained. The courts would therefore appear to prefer widening the definitions of treatment and treatability to increase the chances of admission. Despite the broadening of the treatability test, it remains a source of criticism.[108]

4.2.4. Risk Assessment

The MHA requires that detention be "for the health or safety of the patient or for the protection of other persons".[109] The criterion speaking of the patient's health or safety usually refers to non-dangerous mentally disordered individuals. The consideration of the protection of others deals with those who pose a risk of harm to the public. In relation to psychopathic disorders, the latter is most likely to be the incentive for application for detention, and so shall be the focus of this discussion. It is here submitted that detaining individuals with psychopathic disorder for the protection of others is a political, rather than medical, exercise. Therefore the risk assessment involved does not focus on the mental health of the patient. The emphasis is on danger to the public. Thus, since the emphasis is on risk assessment, assessing patients for psychopathy based on the PCL-R would be beneficial.

The MHA places the bulk of the decision-making burden on doctors who are approved medical officers.[110] In relation to the civil

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[108] See Written Evidence of Dr Bridget Dolan in *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* (Dr Dolan said, at 189: "You either say the whole Mental Health Act is only for treatable people, it is about mental health treatment, so you should only give it to people who will benefit from the treatment, or you do not put it there for anybody."

[109] The Mental Health Act, section 3(2)(c).

[110] See Ibid., section 20, the responsible medical officer can renew a section 3 detention. The Mental Health Act, section 17 gives the responsible medical officer the authority to grant leave of absence.

route to mental health confinement, it is up to doctors to decide whether or not to enforce treatment on a patient. It is only when diverted from the criminal justice system that this decision-making capacity rests within the courts. Even then, the courts tend to defer to the recommendation of the doctors.[111] Hence, the assessment of whether a potential patient presents a risk to others is a medical task to be performed by the medical team.

Nevertheless, detaining the psychopathically disordered is more of a political decision than a medical one. The reason for confining these individuals is primarily the protection of others. Public protection is a social order mechanism of the state, and not a therapeutic one. Individuals in society have the right for their lives, liberty, and autonomy to be protected, and the state has a corresponding duty to protect its citizens. When a state uses mental health law to restrain people deemed dangerous to the public, whether or not disguised as a therapeutic undertaking, it is using methods of social control. Such political and legal techniques are based on social, political and legal principles, albeit not ignoring medical and empirical findings. Granted, public protection is the aim of certain types of medical detention, for example in relation to infectious diseases. However, those patients receive treatment that aims to restore their health. Psychopathically disordered individuals, however, due to current opinion, are unlikely to be so treated. In combination with the broad definition of treatment in the context of the treatability requirement, detention might become possible despite uncertain prospects of success.

Protection of other persons entails an assessment of the risk posed by the patient to the public in the future. It refers to the risk the patient will present if not detained and treated. According to the

[111] J.S. Thompson and J.W. Ager "An Experimental Analysis of Civil Commitment Recommendations of Psychologists and Psychiatrists" 6.1 *Behav. Sci. Law* 119-129, at 127.

Revised Code of Practice,[112] the 'protection of others' test calls for assessment of the nature and likelihood of risk, as well as the level of risk to others. The nature of the risk most likely refers to the nature of the harm, specifically the type of offence predicted. Thus, a risk of the patient causing physical harm or serious and persistent psychological harm to others shall suffice.[113] Apparently, there is no requirement for the risk to be of serious harm.[114] Interestingly, the Scottish Parliament introduced such a requirement in 1999[115] in relation to appeals requesting release, to the effect that release must be granted if, *inter alia*, there is no risk of serious harm to the public. For the purposes of application for treatment under the MHA, risk of harm shall suffice. Moreover, the MHA does not specify whether the harm should be restricted to physical harm caused by violent or sexual offences, thereby permitting the option of risk of emotional harm to suffice for detention.[116] Such harm must be serious and persistent for it to be justifiably included in the use of such a preventive measure.

The likelihood of the risk ought to be high, although no guidance is given as to the exact odds. Thus, discretion is given to responsible medical officers in deciding the likelihood of the patient causing harm to others. According to case law, the protection of other persons does not necessarily mean the protection of the public. It could just as well refer to the protection of an individual or group

[112] *Revised Code of Practice for the Mental Health Act 1983* (W051609/AH/5 1999), para 2.9.
[113] See Ibid., para 2.9.
[114] See *R v North West London Mental Health NHS Trust ex p. Stewart* (1998) 39 BMLR 105, per Harrison J., cited in Jones *Mental Health Act Manual* at 26: "nor is there the requirement that such persons should be protected 'from serious harm.'"
[115] The Mental Health (Scotland) Act, as amended by the 1999 Act, provides: "64. (A1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall refuse the appeal if satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not."
[116] See the *Revised Code of Practice for the Mental Health Act 1983* (para 2.9, where it is written: "A risk of physical harm, or serious persistent psychological harm, to others is an indicator of the need for compulsory admission".

of persons.[117] Hence it shall suffice to prove that the patient presents a risk to a member of his family, a neighbour, a stranger etc. It is not necessary for the risk to be of such magnitude as to threaten society at large.

The uncertainties of the risk to be measured are reminiscent of the clinical practices of dangerousness predictions. The same criticisms therefore apply. Indeed several independent inquiries have made recommendations in relations to the risk assessment of harm to others presented by a patient. Particularly, they recommend that risk assessment procedures be exhaustive and consider all information in a multi-disciplinary manner.[118] They warn, "an incomplete assessment of the risk of violence to others may either provide false reassurance to colleagues, family and friends or unfairly label the patient as violent to the detriment of his or her treatment programme".[119] It is thus maintained here, reiterating previous discussions,[120] that PCL psychopathy ought to be an integral part of risk assessment procedures.

4.2.5. Discharge

Until the end of 2001, the burden of proof in discharge proceedings rested with the patient. Section 72 of the MHA formerly required that the Mental Health Review Tribunal discharge a patient if "he is not then suffering from mental disorder or from mental disorder of a nature or degree which warrants his detention",[121] or if "his detention as aforesaid is not justified in the interests of his own

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[117] *R v North West London Mental Health NHS Trust ex p. Stewart* per Harrison J., cited in Jones *Mental Health Act Manual*, at 26.
[118] See Wiltshire Health Authority *Report for the Independent Inquiry into the Care and Treatment of Richard Gray* (2001); Leicestershire Health Authority *Report for the Independent Inquiry into the Treatment and Care of Paul Hundleby* (2001); Bedfordshire Health Authority *Report for the Independent Inquiry into the Care and Treatment of William Scott* (1997).
[119] *Report for the Independent Inquiry into the Care and Treatment of William Scott.*
[120] See chapter three.
[121] The Mental Health Act, section 72(1)(a)(i).

health or safety or with a view to the protection of other persons."[122] Essentially the provision required the patient to prove that the conditions for detention were no longer fulfilled. The tribunal members "have to be satisfied, and should state that they are satisfied, that he is not then suffering from mental disorder. That is not the same thing as saying the tribunal is not satisfied that he is so suffering."[123] If it were the latter, then the burden of proof would rest with the health authority. This also applies in relation to psychopathic disorder and the treatability requirement.[124] This is so because when the tribunal deliberates the possible discharge of a patient, the issues to be dealt with are equivalent to the questions to be considered under an application for admission.[125] Thus, a psychopathically disordered patient applying to the tribunal for discharge would have to prove his case. He would have to prove the following: (a) that he did not suffer from a psychopathic disorder; or (b) that the psychopathic disorder was not of a nature or degree warranting detention; or (c) that the disorder was not treatable; or (d) that detention is not justified based on his own health or safety or the protection of others. This is a heavy burden to be assumed by a patient asking for his sequestered liberty to be restored.

In 2001, however, the Court of Appeal declared the section incompatible with the European Convention on Human Rights,[126] specifically Article 5.[127] Article 5 of the ECHR allows compulsory detention only if it can be shown that the patient is suffering from a mental disorder that warrants such detention. Expecting the patient to prove that detention is no longer warranted is therefore an

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[122] Ibid., section 72(1)(a)(ii).
[123] See *Perkins v Bath District Health Authority and another; R v Wessex Mental Health Review Tribunal, ex p Wiltshire County Council* (1989) 4 B.M.L.R. 145 (CA) per Lord Donaldson MR.
[124] See *Reid v Secretary of State for Scotland*, per Lord Clyde, at 533.
[125] See Ibid., per Lord Clyde, at 527.
[126] Henceforth, the 'ECHR'.
[127] R *(on the application of H) v Mental Health Review Tribunal, North & East London Region* (2001) HRLR. 36 (Court of Appeal)

excessive violation of Article 5.[128] The burden should rest with the party seeking to continue detention. The Court held that MHA discharge provisions could not be read as imposing the burden of proof on health authorities rather than the patient. Doing so would be to strain the meaning of statutory language.[129]

Following this decision, the Secretary of State for Health remedied this incompatibility with the Mental Health Act 1983 (Remedial) Order 2001. The order transfers the burden of proof away from the patient. Tribunals are now required to order the patient to be discharged if *not* satisfied that he is suffering from a mental disorder of a nature or degree warranting detention, or in the interests of his own health or safety or with a view to the protection of other persons.[130] Interestingly, the Remedial Order goes further than the ECHR. Article 5 of the ECHR is not as restrictive as admission provisions in the MHA. Article 5 merely requires that the patient be of unsound mind. Other admission requisites such as the treatability test are not deemed necessary by the ECHR.[131] Nevertheless, before a tribunal can refuse to order the discharge of a patient, they must consider whether or not admission requirements are satisfied. If they are not persuaded that these requirements are met, they must order discharge.

Consequently, it is now the duty of health authorities objecting to a patient's application for discharge to demonstrate that conditions for detention continue to be met. For a psychopathically disordered individual to remain in detention, therefore, mental health authorities must establish that his condition is treatable.

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[128] Ibid. at 761.
[129] See Ibid., at 760.
[130] The Mental Health Act, section 72. See also Jones *Mental Health Act Manual*, at 354-369.
[131] See R *(on the application of H) v Mental Health Review Tribunal, North & East London Region*, at 761.

4.2.6. Review of the Mental Health Act 1983

It is a premise made here that the implications of allowing psychopathic individuals to roam free in society are unwanted. It has been shown that psychopaths are more likely than non-psychopaths to effect harm in the community. Preventing such harm from occurring is therefore an important aim of the legal system. Since psychopaths arguably lack moral agency, they ought not to be punished for their infractions. Another alternative exists in the mental health system. The status of psychopathy as a mental disorder suggests that mental health management is the appropriate route. The MHA enables the detention for treatment of individuals with psychopathic disorder. Since that is distinct from PCL psychopathy, the effect on PCL psychopaths remains unclear. In relation to psychopathically disordered individuals, however, the MHA requires that the disorder be deemed treatable before detention is made possible. Despite broad interpretation of treatability by the courts, the requirement continues to impede detention. Whether it is due to unnecessary therapeutic pessimism or patients' aversion to treatment, the treatability requirement continues to draw criticism. Furthermore, the majority of existing treatment programmes are inadequate when dealing with psychopaths. Effective management of psychopaths requires therefore better-tailored treatment programmes as well as fewer obstacles to treatment and detention. Recent proposals for reform of the MHA may offer such improvements.

4.3. The Draft Mental Health Bill 2002

In a fresh attempt to modernise the mental health system, the government published a draft Mental Health Bill[132] in the summer of 2002.[133] Closely based on the White Paper of 2000,[134] the draft

[132] Hereafter the 'draft Bill'.
[133] Published on 25 June 2002.

Bill aims to revamp current practices in general, with a specific focus on tightening the gap in the system which allegedly leaves dangerous mentally disordered individuals unconfined and society endangered. The release of Michael Stone from a mental health facility and the subsequent murder of Lynn and Megan Russell in 1996 exemplified this issue. The perpetrator, Stone, diagnosed as suffering from severe personality disorder, was deemed untreatable and thus un-detainable. According to the currently applicable treatability test, the detention of those diagnosed as suffering from psychopathic personality disorder[135] is prevented unless "treatment is likely to alleviate or prevent a deterioration" of the condition. Since much contemporary psychiatric opinion rejects the treatability of this condition,[136] detention may become less likely.

4.3.1. Psychopathic Disorder

The draft Bill modified the conditions for compulsory admission, establishing four specifications for compulsion.[137] First, the patient must suffer from mental disorder.[138] Second, that mental disorder must be of such a nature or degree as to warrant the provision of medical treatment.[139] Third, medical treatment is necessary for the protection of others[140] or the health or safety of the patient.[141] Lastly, appropriate medical treatment must be available in the particular case.

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[134] *Reforming the Mental Health Act* (Cm 5016 2000).
[135] As well as those diagnosed as mentally impaired. See The Mental Health Act, section 3(b).
[136] See Hare *Without Conscience* at 192-206 discussing the failure of traditional therapy methods in alleviating the condition of psychopathy or its symptoms.
[137] Draft Mental Health Bill, section 6.
[138] Ibid., section 6(2).
[139] Ibid., section 6(3).
[140] In the case of patients posing a substantial risk of causing serious harm to other persons. See Ibid., section 6(4)(a).
[141] In the case of patients posing a substantial risk of causing serious harm to other persons. See Ibid., section 6(4)(b). There is an added requirement in relation to these patients that treatment cannot be provided to otherwise. See Draft Mental Health Bill, section 6(4)(b)(ii).

Following examination of a potential patient, two medical practitioners and an approved mental health professional must diagnose a mental disorder suffered by the subject, to be proven by objective medical evidence.[142] The definition of 'mental disorder' specified in the draft Bill is broader than that stipulated in the MHA, as follows: ""Mental disorder" means any disability or disorder of mind or brain which results in an impairment or disturbance of mental functioning; and "mentally disordered" is to be read accordingly."[143] This definition dispenses with the categories of the current law,[144] including that of psychopathic disorder, substituting it with a broad definition of mental disorder, essentially to be defined by the mental condition of the patient. Arguably, this allows for a diagnosis of mental disorder to accommodate changes in the psychiatric consensus as to what constitutes a mental disorder warranting detention. At least in formal terms it extends the powers of mental health professionals to detain patients. Doctors are no longer required to diagnose a specific mental disorder. They may consequently avoid difficulties arising out of particular disorders such as psychopathy. Indeed, the draft Bill goes further than most in dismissing the disorder of psychopathy by not offering a substitute. The removal of psychopathic disorder eliminates the problems associated with that legal category. The new definition therefore enables the assigning of better services to those suffering from PCL psychopathy. By removing the obscure category of psychopathic disorder, they improved the differentiation between psychopathy and psychopathic disorder, thereby purging psychopathy of its weaknesses assigned to it by association.

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[142] Draft Mental Health Bill, sections 9(4), 10.
[143] Ibid., section 2(6).
[144] I.e., mental illness, arrested or incomplete development of mind, psychopathic disorder, mental impairment and severe mental impairment. See The Mental Health Act, section 1.

The White Paper preceding the draft Bill recommended the introduction of the term DSPD, defined by means of "two coexisting characteristics: the first is that they suffer from a personality disorder or disorders, one of which is often antisocial/dissocial personality disorder; and the second is that they are at risk of causing serious harm to others."[145] DSPD refers to a group of highly disruptive individuals who are known to services. It is safe to assume that 'severe personality disorder' fundamentally refers to personality disorders of antisocial nature,[146] rather than a severe nature of, say, obsessive-compulsive or avoidant personality disorders. As such it is conceivably a more heterogeneous category than the MHA psychopathic disorder thereby allowing the focus to be on those who are disorderly, disagreeable and who do not fit the specific and contentious category of psychopathic disorder. Much seems to be centred on the assessment that these individuals will continue to be violent and dangerous in future unless interventions are made.

However, the architects of the draft Bill dropped the term DSPD despite approval in both the White Paper[147] and the Home Office policy recommendations.[148] This is arguably surprising considering the great emphasis placed on this category. However, this departure is in name only. Possibly the government never intended to mention DSPD in legislation.[149] Indeed the term DSPD remains in use in treatment programme development and testing.[150] It would thus appear clear that DSPD is the category that aims to replace

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[145] See the Executive Summary of the *The Report of the Committee of Inquiry into the Personality Disorder Unit, Ashworth Special Hospital* para 6.1.9; *Reforming the Mental Health Act* Part II, paras 1.5-1.6; *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development* paras 1-2.

[146] See Home Office *A Feasibility Study into Using a Randomised Controlled Trial to Evaluate Treatment Pilots at HMP Whitemoor* (14/02 2002) at 7: "Severe personality disorder overlaps with "psychopathy" but these are two different concepts."

[147] *Reforming the Mental Health Act* (Cm 5016 2000).

[148] *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development/*

[149] N. Shackleford "DSPD, Psychopathy and the Draft Mental Health Bill 2002" (Personal Communication 2003).

[150] See Home Office *et al.*, "DSPD Programme"

psychopathic disorder, even in the absence of it from the draft Bill itself. Since this small group consists "of individuals with mental disorder ..... who are characterised primarily by the risk that they present to others", special management is deemed essential. A joint initiative between the Department of Health, the Home Office and the Prison Service has developed a special programme for DSPD which is underway. The government is currently developing and piloting a choice of specialist services for the assessment and treatment of DSPD in both prison and NHS high secure facilities.[151] The DSPD programme is "highly innovative" and "rigorously evaluated" aiming to ensure that the individuals concerned are managed suitably.[152]

Hence, despite the fact that the term DSPD is missing from the draft Bill, the concern with confining DSPD individuals is evident from the government's activities. Furthermore, the wide definition of 'mental disorder' in the draft Bill makes the compulsion of treatment of these individuals possible without reference to specified disorders and behaviours. This definition is dynamic enough to encompass any changes in the psychiatric consensus as to what constitutes a mental disorder that merits detention. Some might say the category of mental disorder is too broad. It might permit mental health professionals to treat compulsorily individuals whose diagnosis eludes psychiatrists. However, the second and third conditions to treatment under the draft Bill distinguish those individuals whose disorder does not justify compulsion. Therefore, the aim of the new definition of mental disorder is to permit the treatment of individuals suffering from disorders that previously may have precluded them from receiving treatment. However, included safeguards prevent compulsion from being overused and

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[151] See Ibid.. By the end of 2004, more than 250 high secure places will be available for DSPD units at HMP Whitemoor, HMP Frankland, Broadmoor Hospital, Rampton Hospital.

[152] See *The Dangerous and Severe Personality Disorder (DSPD) Programme Fact Sheet* (2004).

abused. Thus, not all mentally disordered individuals may be detained. Rather, compulsion is only possible if all four conditions are satisfied. The choice to exclude the term DSPD from the draft Bill is thus sensible and explicable. It does not prevent individuals suffering from psychopathy treated, nor does it make their detention overly straightforward.

4.3.2. Entry

Unlike the MHA, the draft Bill distinguishes between patients on the basis of the level of risk they pose. "In the case of a patient who is at substantial risk of causing serious harm to other persons, ... it is necessary for the protection of those persons that medical treatment be provided to him".[153] Conversely, in relation to other patients, namely low-risk patients, compulsion must be necessary for the health or safety of the patient or the protection of other persons.[154] Furthermore, treatment can only be afforded here if it cannot otherwise be provided.[155] Thus, the main reason for compulsion in relation to high-risk patients, as opposed to low-risk patients, is the protection of others, rather than the therapeutic benefit to the patient. Indeed, there is no requirement that treatment be for the benefit of the high-risk patient, or that the safety or welfare of the patient himself calls for compulsory treatment. There is no obligation to make sure this is the least restrictive measure that would achieve the purpose, unlike in relation to low-risk individuals.[156] Therefore decision makers are not obliged to choose community treatment of an individual who poses risk even if that is a viable option. Failing to require that the patient personally benefit from treatment means that the focus of treatment is on reducing the risk the patient poses to the public,

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[153] Draft Mental Health Bill, section 6(4)(a).
[154] Ibid., section 6(4)(b)(i).
[155] Ibid., section 6(4)(b)(ii).
[156] Ibid., section 6(4)(b)(ii): "treatment cannot be provided to him unless he is subject to the provisions of this Act".

rather than alleviating patient's suffering. This suggests preventative detention rather than therapeutic detention. Detention of high-risk individuals works to prevent them from harming members of the public. This is a problematic response in the context of mental health system. The emphasis of mental health management has conventionally been treatment. The long-established responsibility of mental health professionals is to treat mental disorders and psychological pain, and not detain people for the protection of the public. Protection of the public has traditionally been the responsibility of the criminal justice system.

Psychiatric preventive detention or involuntary commitment is not a new idea, and neither is it a very popular one. Foucault implicated psychiatrists in such detention practices during the seventeenth century.[157] Evidence has not been scarce since.[158] Mental health commitment against the patient's will results in a loss of liberty identical to that following incarceration in prison. The distinction exists in the rationale for detention. Unlike criminal detention, civil detention is not rooted in a crime committed by the detainee. Rather, the basis for detention is the patient's mental disorder and the risk stemming from that mental disorder. Unlike criminal detention, it is not derived from a bad choice made by the person to be detained. The responsibility for the development of mental disorder cannot usually be assigned to the patient. The patient does, however, have a choice of whether to accept or refuse treatment. Often though it is the mental disorder that influences that decision. Consider, for example, the case of the psychopath. The disorder of psychopathy produces the psychopath's lack of insight and motivation. The psychopath's aversion to treatment, therefore, cannot be said to be due to free choice, as it is affected by the disorder. Nonetheless, treatment may be deemed necessary despite

[157] See Foucault *Madness and Civilization.*
[158] See A. Forrester "Preventive Detention, Public Protection and Mental Health" 13.2 *J Forensic Psychiat* 329-344, at 336-337.

the patient's refusal, therefore giving rise to arguments justifying involuntary detention.

The practices of involuntary detention continue to be challenged by civil liberties arguments. Some go as far as to reject the idea in its entirety,[159] but the majority criticise the procedures of civil commitment. Arguably, the civil detention of those who pose risk to the public dangerously bypasses the safeguards of the criminal justice system. The practices of punishment in the criminal justice system are governed by theories and principles that have been continually polished and refined. Safeguards exist to defend the rights of prisoners and prevent system abuse. Mental health detention has not benefited from the same systematic scrutiny. The mental patient has been said to be "a slave of the mental health system."[160] Perhaps it adheres to the view that since the mentally disordered are not full moral agents, they do not possess full human rights.[161] Recent advances in the law, however, have improved the protection of patients' rights. Since 2000 the HRA has brought into effect ECHR rights as domestic law. Granted the ECHR was binding on the UK prior to the HRA. However, the direct applicability of these rights following the HRA has improved protection.[162] Nonetheless, mental health detention continues to be deficient compared to criminal justice detention. It lacks established principles that govern the application of such detention. Recent advances are just that – recent. A pattern of precedents has to develop before principled application transpires. For that reason, the rights of patients ought to be guarded vigorously. Preventive detention based on risk to the public must be cautiously applied employing a high standard such as 'substantial risk of serious harm.'

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[159] See T. Szasz "Psychiatry and the Control of Dangerousness: On the Apotropaic Function of the Term "Mental Illness"" 29 J. *Med. Ethics* 227-230.
[160] Szasz, T., "Remember Psychiatric Patient's Civil Rights" *Seattle Post-Intelligencer* (April 3 2003).
[161] See Gewirth *Reason and Morality*, at 122.
[162] For further discussion, see J. Bindman *et al.*, "The Human Rights Act and Mental Health Legislation" 182.2 *Brit J Psychiat* 91-94.

Knowledge of risk probabilities shows that it is a complex endeavour and that, like any other prediction attempt, it is limited. Predicting the risk a mental patient poses to the public should be done meticulously, taking into account all the relevant risk factors. Despite the inherent uncertainties, an effort must be made to reach a risk that is vivid.[163] The high standard specified in the draft Bill is encouraging, and seems to indicate that the government is not underestimating the gravity of the exercise of compulsion. Considering PCL psychopathy in risk assessment procedures is bound to improve results. As a preceding chapter discussing risk assessment demonstrated, PCL psychopathy is highly correlated with institutional misbehaviour as well as criminality. Therefore, focusing risk assessment practices on psychopathy will differentiate these high-risk individuals and, in the future, may facilitate specialised treatment and risk-reduction management.

4.3.3. Treatability and Availability

The draft Bill dispensed with the treatability test and introduced a new constraint, namely the availability test, permitting detention only where "appropriate medical treatment is available in the patient's case."[164] This may be a significant limitation on admission to hospital, although the extent of its effect shall depend on whether it is construed narrowly or not. The absence of the treatability test may have a widening effect of the accessibility to detention.

The treatability test[165] has been heavily criticised for being divisive, conflict-ridden and discriminatory. Specifically, some argue it precludes admission of some seriously problematic individuals

[163] See R. Dworkin *Taking Rights Seriously* (Harvard University Press 1977), at 11.
[164] Draft Mental Health Bill, section 6(5).
[165] The Mental Health Act, section 3(2)(b): "such treatment is likely to alleviate or prevent a deterioration of his condition".

suffering from disorders to which no known successful treatment currently exists. Even though the courts have narrowly construed this barrier,[166] it sometimes succeeded in disqualifying personality-disordered individuals from detention eligibility.[167] The intentional removal of this test from the draft Bill is probably aimed at facilitating compulsory detention of dangerous individuals with severe personality disorders.[168] The expressed objectives are to protect the public from the risk they pose by managing and reducing that risk.[169] This will be achieved should the draft Bill be implemented as is, conditional upon the cooperation of mental health professionals.

In the absence of the treatability test, the drafters' retention of the medical treatment requirement suggests that detention of the untreatable is not the goal. Treatment is no longer required to alleviate or prevent deterioration of conditions such as psychopathic disorder,[170] but its availability must be proven. Availability of treatment relates both to practical constraints, such as the availability of resources, as well as more fundamental issues, such as the existence of treatment for a particular disorder. Therefore the availability test may simply be a new obstacle to replace the old 'treatability test' obstacle to the treatment and detention of psychopathic individuals. Should the therapeutic pessimism in relation to psychopathy persist, clinicians are unlikely

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[166] See above discussion of *Reid v Secretary of State for Scotland*, where anger management resulting in the prevention of deterioration of symptoms of disorder, such as aggressive behaviour, sufficed, even if this was not directed at the disorder itself but its symptoms.

[167] Psychopathically disordered individuals could challenge the decision to treat them, and may thereby be able to avoid being detained under the Act. See *Mental Health Bill Consultation Document* (Cm 5538-III 2002), para 2.11: "Patients may challenge decisions to treat them compulsorily including during the initial 28 day period, by making an application to the Mental Health Tribunal."

[168] See Ibid., at 23: "This removes a problem in the 1983 Act where the 'treatability' test prevents people with mental impairment or psychopathic disorder from being treated under statutory powers for their own benefit or to protect the safety of others. This will no longer appear."

[169] See *Reforming the Mental Health Act* (Part II, Chapter one, para 1.4: "for some people their plan of care and treatment will be primarily designed to manage and reduce high risk behaviours which pose a significant risk to others."

[170] The Mental Health Act, section 3(2)(b).

to view treatment as available. Arguably, the wide definition of 'medical treatment' would permit all kinds of management of the disorder and its consequences. The consultation document specifically refers to risk reduction and management of consequences of such severe personality disorder producing dangerousness.[171] Thus it is reasonable to expect that the government intended to include a wide variety of care and habilitation, such as nourishment,[172] education, anger management courses etc. Note that these services are currently to be found in prison settings and do not necessarily require a medical environment. Thus, the broad interpretation of treatment may negate the effect of therapeutic pessimism in relation to the treatability of psychopathy. Still, much rests on the willingness of clinicians to use these powers of compulsion.

4.3.4. Psychiatric Accord

For the draft Bill to have the desired effect of facilitating the detention of personality-disordered individuals, the cooperation of psychiatric profession is necessary. According to the Health Minister, the implementation of the draft Bill will require another hundred psychiatrists. The Royal College of Psychiatrists identify six hundred psychiatrists as necessary.[173] Not only does the implementation of the draft Bill require a large number of psychiatrists in employment, but for the draft Bill to achieve its aim, clinical interpretation and cooperation is essential. Those in command of the compulsory powers are clinicians and as such control admission to hospital. The government may wish to detain personality-disordered individuals deemed dangerous, but without clinicians' compliance, this power of compulsion shall remain

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[171] Page 23 of the *Mental Health Bill Consultation Document.*

[172] In *R v Dr James Donald Collins and Ashworth Hospital Authority ex p. Ian S Brady* (2000) CO/68/2000 (QB) force-feeding was deemed to be treatment for the purpose of the 1983 Act.

[173] L. Duckworth "Anger at Plan for Indefinite Detention of People with Dangerous Mental Disorders" *Independent* (26 June 2002).

unused and become redundant. Anyone may request examination[174] and thus trigger the first stage of the use of compulsory powers. However, it is up to the examiners, two medical practitioners and an approved mental health professional, to assess the patient and determine whether the conditions for compulsion are met and whether assessment should be carried out. There seem to be no mention in the draft Bill of any right of appeal against a clinical decision not to use compulsory powers. If one of the examiners holds that not all conditions are satisfied, the patient is not liable to assessment, without further ado.[175]

Psychiatric cooperation has already suggested itself to be a serious problem the government will need to remedy. Psychiatrists and other mental health professionals have voiced their dissatisfaction with the draft Bill,[176] saying it is "ethically unworkable and practically unacceptable."[177] Early research has exposed a negligible number of psychiatrists willing to work in specialist services aimed at DSPD.[178] However, considering the ample resources injected into the working of the draft Bill, including new DSPD programmes, psychiatrists may have a change of heart. With more resources available, clinicians would be better able to perform their responsibilities. Pessimism may ease and optimism may grow. However, even if the government succeeds in recruiting the number of clinicians required, there are likely to be more than a few further difficulties.

The safety of the public, according to the government proposals, demands a focus on potential dangerousness. This focus on risk to

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[174] Draft Mental Health Bill Clause 9(1): "The appropriate Minister must, if requested to do so by *any person*, determine whether the relevant conditions appear to be met in the patient's case." Emphasis added.
[175] Ibid., section 11. This is subject to the exception of emergency patients.
[176] Z. Kmietowitcz "Psychiatrists, Lawyers, and Service Users Unite Against Proposed Bill" 325.7360 *British Medical Journal* 354.
[177] Per Dr Mike Shooter, president of the Royal College of Psychiatrists, in Ibid.
[178] 21%: Haddock *et al.*, "Managing Dangerous People with Severe Personality Disorder: A Survey of Forensic Psychiatrists' Opinions", at 294.

the public will produce ethical dilemmas for professionals whose duties traditionally regard the welfare of the patient, rather than the safety of the public. When faced with a patient suffering from a personality disorder with a poor prognosis, who is deemed dangerous according to standards set by the government, a clinician has to choose between the autonomy of the individual and the potential risk to the public. Beyond the difficult moral dilemma and therapeutic inclination towards not treating the untreatable, this is a task that most clinicians are simply not qualified to do. Most are trained to treat, rather than predict dangerousness, and are further not experienced in dealing with the adverse consequences of such grave decisions. To detain an untreatable personality disordered individual might be effectively furnish them with "the right to rot".[179] Alternatively, to release the dangerous and untreatable individual is to take the risk of being partly morally blameworthy for their future violent conduct.

The aim of the draft Bill will be frustrated if clinicians interpret it narrowly. For example, if clinicians choose to exclude from compulsion all those patients who are not likely to personally benefit from treatment, in spite the absence of the treatability test, individuals with DSPD are unlikely to be admitted. Considering the therapeutically focused tradition of psychiatry it is reasonable to expect a narrow and cautious interpretation. Such interpretation would negate any public protection intentions hidden in the draft Bill, replicating the existing problem of detaining the psychopathically disordered. Alternatively, one may envision the emergence of a new generation of forensic clinicians,[180] thoroughly and genuinely engaged in the task of protecting the public from personality-disordered individuals who pose risk of violent and

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[179] P.S. Applebaum and T.G. Gutheil "The Boston State Hospital Case: 'Involuntary Mind Control'; The Constitution and the 'Right to Rot'" 137 *Am J Psychiat* 720-723, at 723.

[180] As is the apparent wish of the government. Recruitment for DSPD programmes has began and details are available on the Home Office DSPD web site – Home Office *et al.*, "DSPD Programme"

disruptive behaviour, thereby uniting psychiatric knowledge with social protection. Perhaps implausible at this time,[181] this is not to be regarded as impossible since nearly a third of psychiatrists questioned feel public protection should be the main focus of these schemes.[182]

Furthermore, British clinicians may grow to be influenced by the North American forensic traditions, abandoning the insular and restrictive attitude and embracing an interdisciplinary tradition. One ought to realise that existing sectarianism of law and mental health disciplines have many adverse implications. Current practice is very discipline-centric, with each discipline carrying out their examinations in isolation from other disciplines. This has the benefit of expertise and specialist knowledge, but its disconnected and reductionist effect are drawbacks. In fact, psychiatric knowledge has a vital impact on law,[183] and law can have a positive impact on psychiatry.[184] Furthermore, not only is forensic psychiatry, unlike pure psychiatry, essentially interdisciplinary, it is exploratory as well as therapeutic. It involves a "search for the truth about the behaviour underlying events."[185] A more interdisciplinary practice will increase multi-agency cooperation and communication and will benefit patients and society. Considering most things do not exist in isolation, the majority being interdependent, treating them as such may indeed enrich us all. This is especially true in relation to those included in the DSPD group, interdisciplinary by its very nature.

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[181] See S.M. White "Preventive Detention Must Be Resisted by the Medical Profession" 28.2 *J. Med. Ethics* 95-98.
[182] 27.5% (n=42): Haddock *et al.*, "Managing Dangerous People with Severe Personality Disorder: A Survey of Forensic Psychiatrists' Opinions"
[183] Inter alia in relation to competency assessment, insanity pleas, mitigating circumstances, reliability of witness recollections etc.
[184] Introducing constitutional and procedural safeguards, balancing protectionism and autonomy, ensuring flow of capital into the mental health system etc. See general discussion in S J. Morse "A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered" 70 *Calif L Rev* 54-106.
[185] Per Dr. Park Dietz, in A. Toufexis "A Psychiatrist's-Eye View of Murder and Insanity" *New York Times* (April 23 2002).

When looked at this way, 'the insularity of the law from mental sciences'[186] is not unavoidable. As undesirable as this may be, a more interdisciplinary attitude might tolerate the detention of dangerous personality-disordered persons in the absence of successful treatment plans or rigorous medical assessment. Such practices may indeed ruffle some human rights feathers. Fortunately, even if this scenario is at all realistic, it is not likely to surface in the near future. In the interim, clinicians are more likely to interpret the draft Bill narrowly so as to avoid the detention of those not susceptible to treatment. This scenario is compatible with the ECHR jurisprudence but may not solve public protests relating to personality disordered individuals released into the community.[187]

This introduces the issue of risk assessment. Risk assessment procedures are not as reliable as the public and the government would like them to be. It might appear too obvious in retrospect that an individual is so dangerous they should never have been allowed to go free. However, one does not have the benefit of hindsight in real time. Risk is not so obvious when the behaviour is still a potentiality among many other behavioural alternatives. Human behaviour is notoriously difficult to predict. Questions as to the degree of probability necessary for the exercise of the compulsory power, the degree of risk, and the degree of harm are important here. These concepts are not defined in the draft Bill and long-term practices in the US have not succeeded in clearly delineating such complex models.[188] Furthermore, the prospect of false-positives and false-negatives occurring introduces serious ethical problems regarding those falsely detained and wrongly discharged. Preliminary analysis of the validity of the DSPD

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[186] N. Eastman and J. Peay "Law Without Enforcement: Theory and Practice" in N. Eastman and J. Peay (eds) *Law Without Enforcement: Integrating Mental Health and Justice* (Hart Publishing 1999), at 21-24.

[187] Such as the public outcry following the case of Michael Stone.

[188] For a general discussion, see Morris "Defining Dangerousness: Risking a Dangerous Definition".

category is discouraging. It is suggested that typically, six people per annum would have to be detained to prevent one from acting violently.[189] Furthermore, a proportion of DSPD individuals would escape the system's attention,[190] as they do at present. So, not only is the system likely to unjustifiably detain those presenting low risk, it is unlikely to adequately protect the public against violent incidents by dangerous personality disordered individuals. In order for risk assessments to be adequately accurate, procedures must be stringently applied. Clinicians must consider all relevant risk factors using an actuarial approach. Resources as well as clinicians' willingness to apply these techniques must be suitably applied.

Thus, without the full cooperation of the mental health profession, these new compulsory powers may never succeed in protecting the public from individuals with DSPD. Arguably, mental health professionals object to detaining individuals who do not require medical treatment; they are unlikely to cooperate with a purely preventative detention scheme. Psychiatrists and psychologists have been ambivalent about the existence of some personality disorders, let alone their treatability and change is unlikely to come soon. Even in the absence of the treatability requirement, psychiatrists are liable to continue to refuse to detain personality-disordered individuals.

The forcible detention of the mentally disordered is an exception to the principle of liberty.[191] Tolerance to liberty deprivation of the mentally disordered is founded on the logic that they "present a special problem since they may be liable, as a result of mental illness, to cause injury either to themselves or to others"[192] and often lack the necessary competence to favourably care for

[189] A. Buchanan and M. Leese "Detention of People with Dangerous Severe Personality Disorders: A Systematic Review" 358.9297 *Lancet* 1955-1958, at 1958.
[190] Ibid.
[191] Another being the convicted criminal.
[192] Per Sir Bingham MR in *Re S-C (Mental patient: Habeas Corpus)* (1996) 1 All ER 532 (CA), at 534-5. See also Jones *Mental Health Act Manual* at 18-19.

themselves. Despite the possibility of interpreting the draft Bill to allow pure preventive detention, practicalities are likely to restrict its application considerably. The mental health profession is already reluctant to detain individuals who are unlikely to benefit from treatment in a hospital, and there seems to be no reason why this reluctance should change.

4.3.5. ECHR Compatibility

Many human rights advocates have criticised the draft Bill for creating a regime of preventive detention that endangers the rights of patients.[193] In light of growing awareness of human rights concerns, and the enactment of the Human Rights Act, such arguments may be of significance. Examining the compatibility of the draft Bill with the demands of the European Convention on Human Rights[194] is therefore indispensable. Despite widespread condemnation of the draft Bill, however, it appears as though no ECHR breaches are likely to arise.

The European Convention on Human Rights, previously an international treaty, is now part of the domestic law of the UK following the enactment of the Human Rights Act 1998[195] in October 2000. Prior to the HRA, the UK was bound by the ECHR as a piece of international law to which the UK was a signatory. This aspect of the ECHR as a binding piece of international law has not changed. One may take a case to the European Court of Human Rights[196] if one of the ECHR rights has been violated. The access to the ECtHR is enabled after one exhausts domestic law. The difference that the HRA made is by designating the ECHR a source of English law that is immediately accessible to individuals.

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[193] See for example, *Response to the Department of Health Consultation on the Draft Mental Health Bill* (2002); *Response to Draft Mental Health Bill 2002* (2002)
[194] European Convention on Human Rights 1950, Hereafter the 'ECHR'.
[195] Human Rights Act 1998, Hereafter the 'HRA'.
[196] Hereafter 'the ECtHR'.

Essentially, the HRA works on three levels. Firstly, All UK legislation must be interpreted in a way that is compatible with the Convention rights.[197] If this is not possible, courts can declare the Act incompatible[198] and it will be up to Parliament to decide whether to amend it or not. It is worth noting that the courts may be reluctant to declare an Act incompatible, as it does not affect the parties to the proceedings, who are the responsibility of the court, and who are thus left without remedy. Second, the HRA makes it unlawful for public authorities to breach ECHR rights.[199] Accordingly, bodies with functions of a public nature, such as mental health hospitals, must take care that they do not breach the rights of patients and other individuals affected by their decisions.

Third, individuals whose ECHR rights have been breached may argue this in national courts and need only resort to the ECtHR if there is no remedy available to them under national law. There are two main avenues available to individuals wishing to argue ECHR issues. An individual may argue that an Act of Parliament pertaining to his case is incompatible with the ECHR, inviting the court to interpret it in light of the ECHR. Conversely, a victim[200] of an unlawful act committed by a public authority may bring direct proceedings against the authority before the courts.

The HRA had increased consciousness of mental health professionals in relation to the rights of those subject to the MHA 1983 and its provisions. The MHA 1983 has nonetheless been subject to a number of challenges regarding its compatibility with ECHR rights[201] mostly in relation to its application.[202] However, due

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[197] Human Rights Act, section 3.
[198] Ibid., section 4. The HRA does not confer upon courts the power to invalidate legislation.
[199] Ibid., section 6, Human Rights Act.
[200] Human Rights Act, section 7.
[201] See *X v United Kingdom* (1981) 4 EHRR 188 (ECtHR) and the subsequent *JT v United Kingdom* (2000) 30 EHRR CD 77 (ECtHR), where a patient wanted to change her nearest relative from her mother to a social worker, contrary to The

due to the courts' duty to the parties to a case, it is likely to interpret cases in light of the ECHR and ensure compatibility as far as possible. The draft Bill produces more interesting issues of compatibility.

For the draft Bill to become law, a Minister must make a statement as to its compatibility before the second reading.[203] The Minister can either make a statement of compatibility or one of incompatibility. This is a compliance check, although there is no requirement that the draft Bill be found compatible. Incompatibility is a possibility, as long as it is explicitly asserted. The authors of the draft Bill ensured that contentious points in the draft Bill were drafted in a way that is compatible with the ECHR. They therefore specified that only clinicians shall have the power to detain.[204] This stipulation is aimed at satisfying the requirements for derogation from the right to liberty and security contained in Article 5, that of unsoundness of mind. This is, however, a minimal safeguard and does not guarantee full compliance with the ECHR.

Article 5 right to liberty and security may, however, be derogated from. It is in those derogations that the compliance of the draft Bill lies. Article 5(e) of the ECHR permits the detention of people of unsound mind as an exception to the right to liberty. The question, therefore, is whether the draft Bill conforms to the requirements of Article 5(e) Both the creators of the ECHR and the ECtHR have been reluctant to provide the term 'unsound mind' with an

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Mental Health Act. The Government wrote to the court regarding a settlement and an amendment to the legislation.

[202] *Stanley Johnson v UK* (1999) 27 EHRR 296 (ECtHR), in which an offender waited 3.5 years for the supervised hostel place required for his conditional discharge ordered by the Tribunal, breaching Art 5(1) European Convention on Human Rights.

[203] Human Rights Act, section 19, requiring a declaration of compatibility in Parliament.

[204] Complying with the ECtHR judgment in *Winterwerp v The Netherlands* (1979) 2 EHRR 387 (ECtHR) holding as a condition for the detention of people of unsound mind that there be objective medical evidence supporting the existence of mental disorder of a nature or degree warranting compulsory confinement.

exhaustive definition,[205] recognising the flexible and dynamic nature of psychiatric research and understanding, albeit maintaining it must be a 'true mental disorder.'[206] Therefore, the lack of precise definition of mental disorder in the draft Bill does not necessarily breach Article 5. The draft Bill definition has, however, been criticised for being too wide, expanding the meaning of mental disorder more than needed for the detention of DSPD persons.[207] A vague definition of mental disorder may give rise to arbitrary practices,[208] which may in turn bring about issues of unlawfulness under Article 5.[209] The legality of detention is rooted in its consistent and coherent rationale and application, protecting "against arbitrary interference."[210] The diagnostic practices relating to personality disorders are arguably just that. The pervasive disagreement about the diagnosis among clinicians is bound to create inconsistent use. The "sheer range of psychopathology exhibited by these individuals and its unusual complexity have always posed major challenges to classification."[211] However, the courts appear loath to interfere with expert decisions, especially medical,[212] and so this practice is likely to remain unchallenged, at least until a startling breach occurs.

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[205] See Ibid., paras 36-38.
[206] Ibid., para 39.
[207] See the House of Lords and House of Commons *25th Report on the Draft Mental Health Bill* (HL 181, HC 1294 2002), paras 29-30.
[208] See past criticism of the definition of 'mental illness' in The Mental Health Act, e.g. *Assessment of Mental Capacity, Guidance for Doctors and Lawyers* (1995), para 3.2.1.
[209] See *Winterwerp v The Netherlands*, para 39.
[210] *Gillow v UK* (1986) 11 EHRR 335, at 350.
[211] Royal College of Psychiatrists' Working Group "Definition and Classification of Personality Disorder" in *Offenders with Personality Disorder: Council Report CR71* (Gaskell 1999), at 7.
[212] See *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, where the judge directed the jury not to find negligence on behalf of a doctor if he acted according to a 'responsible body of medical men' even if there was a body of opinion with the contrary view. Basically, this judgment, and the way it was interpreted by courts, has produced an attitude that 'doctors know best'. See also P. Fennell "Doctors Know Best? Therapeutic Detention Under Common Law, The Mental Health Act, and The European Convention" 6.3 *Med L Rev* 322-353.

The draft Bill's second condition for operation of compulsory powers specifies that medical treatment must be warranted. The definition of 'medical treatment' does not set management apart from treatment. According to the White Paper, "therapeutic benefit will cover improvement in the symptoms of mental disorder or slowing down deterioration and the management of behaviours arising from the mental disorder."[213] So, mere management of the aggressive or disruptive behaviour of the personality-disordered shall suffice, so long as it is under medical supervision. This stipulation is liable to be faced with criticism from both patients and clinicians, but not from the ECHR institutions. According to the prevalent view of Article 5(1)(e), there is no obligation for treatment to be provided,[214] thereby allowing for pure preventative detention.[215]

Despite the fact that Article 5(1)(e) does not insist on treatment being given, a successful challenge is still possible in the particular case, as the conditions of treatment may be subject to Article 5 requirements. There is an Article 5(1)(e) obligation that the detention takes place in an appropriate institution.[216] A reasonable relationship must exist between the grounds for detention and the place and conditions of that detention.[217] Therefore, if the reason for confinement is a mental health problem, the patient must be detained in a mental health institution, and not a prison. This issue may arise if the intended institutions are not ready to house all the DSPD individuals detainable under the draft Bill by the time of its ratification. If these individuals are housed in prisons, even

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[213] *Reforming the Mental Health Act* at 26, para 3.21.
[214] The ECtHR in *Winterwerp v The Netherlands* did not require that treatment be offered, at 403, as did the ECtHR in *Luberti v Italy* (1984) 6 EHRR 440, at 449, para 28.
[215] *Anderson v The Scottish Ministers* (2001) SLT 1331 the Judicial Committee of the Privy Council decided the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 did not breach Article 5 despite allowing detention due to public safety concerns.
[216] See *Aerts v Belgium* (2000) 29 EHRR 50 (ECtHR), where the ECtHR held that detention in a psychiatric annexe of a prison breached Article 5(1)(e).
[217] See *Ashingdane v United Kingdom* (1985) 7 EHRR 528 (ECtHR), para 44.

temporarily, until beds are available to them in units specifically catered to them, there will be a possible breach of Article 5(1)(e).[218] Considering the ever-present resource shortage, this is a problem that is likely to transpire, not unlike the situation in relation to community placements in the past.[219]

A 2001 court held that detention on the grounds of risk to others is not necessarily a breach of Article 5, so long as that person is mentally disordered.[220] However, this decision could be distinguished from the situation under the draft Bill, as the case related to restricted patients who have been convicted of a serious offence.[221] The draft Bill allows for the detention of individuals who have not been through the criminal justice system, and therefore does not bestow the procedural guarantees of the criminal justice system. Hence, should a case come before the ECtHR, more stringent safeguards might be required that at present the draft Bill does not provide.

To conclude, it would appear as though the draft Bill does not, on the face of it, breach the ECHR. The only foreseeable breach at the moment might arise in relation to detention facilities. Even that, however, is unlikely, considering the government's energetic work on DSPD units in recent years. Thus challenges to the draft Bill appear to be less probable than predicted by some.

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[218] As this will be detention not on the basis of a criminal conviction in an institution for the convicted criminal, sanctioned by Article 5(1)(a).
[219] In the case of *Stanley Johnson v UK*, following medical evidence demonstrating he no longer suffered from mental illness, the Tribunal ordered the discharge of J subject to a condition that he live in a hostel and be supervised by a psychiatrist and social worker and that his release should be deferred until a suitable placement was found. The authorities were unable to find a hostel willing to accommodate J. The indefinite deferral of J's release constituted a breach of Art. 5.
[220] See *Anderson v The Scottish Ministers.*
[221] See discussion in *Joint Committee on Human Rights. 25th Report. Draft Mental Health Bill. Report, Proceedings of the Committee and Appendices* (181 2002), paras 45-6.

4.3.6. Review of the Draft Mental Health Bill

The reform attempts incorporated in the draft Mental Health Bill presented new conditions for compulsion. The mental disorder requirement in the draft Bill expands on current provisions by disposing of the specific mental disorder categories. The focus on the protection of others in relation to high-risk patients represents a shift of focus from therapeutic needs to risk to the public. The necessity for availability of treatment replaced the treatability test. The intended effect of the new definition of mental disorder, together with the absence of the treatability test, is to remove two of the obstacles to the detention of individuals with dangerous and severe personality disorders. The emphasis on risk may act to increase this effect by introducing the impression of preventative detention. However, these results will remain latent if the psychiatric profession does not act upon them. It has been shown that much of what emerges from the draft Bill will be determined by the actions of clinicians. The existing mood of psychiatrists in England and Wales suggest that they are likely to maintain their therapeutic focus and refuse to preventatively detain personality-disordered individuals in the absence of potentially beneficial treatment. The situation in the US is markedly different, suggesting that perhaps change of attitude is possible, albeit not at present, in the UK. In the interim, the draft Bill appears to present a lesser number of objectionable features than suggested by media reaction to its publication.[222] Moreover, it is submitted that the draft Bill does not introduce measures that necessarily breach the ECHR rights of patients. Therefore, it might even turn out to be an improvement on current measures.

[222] See, for example, A. Travis "Human Rights 'Risk' in Mental Health Bill" *The Guardian* (November 12 2002); T. Independent "Why the Mental Health Bill is Pure Madness" (November 3 2002); D. Batty "Mental Health Bill Sparks Human Rights Fears" *The Guardian* (November 11 2002); *Reform of the Mental Health Act 1983: Response to the Draft Mental Health Bill and Consultation Document* (2002).

4.4. Conclusion

The preceding exposition examined mental health legislation affecting psychopathic individuals. The fact that psychopathy itself was not directly involved in the above discussion does not detract from its importance. The lack of moral agency typical of psychopathy along with its status as a mental disorder predictive of misbehaviour, render it a disorder meriting mental health management. Bearing in mind recent emphasis on the reduction of risk, rather than therapeutic benefit, taking account of PCL psychopathy is bound to prove advantageous. Under both the MHA and the draft Bill, psychopathy is deemed important. The MHA, despite dealing with psychopathic disorder rather than PCL psychopathy, implicates psychopathy by association. The weaknesses of psychopathic disorder as a mental disorder category are in themselves grounds for change. The category of psychopathic disorder should be eliminated and replaced with psychopathy, or transformed to mirror psychopathy. Government proposals for reform, however, are incomplete. They do, though, introduce measures that allow a greater focus on psychopathy by removing the confusing category of psychopathic disorder. The wider definition of mental disorder, combined with the absence of the treatability test, mean that persons with psychopathy would be offered better management services. Thus it is suggested that despite ample criticism of the draft Bill, it presents an improvement of current measures, at least in relation to those suffering from psychopathy. The draft Bill is liable to improve public protection by developing services specifically tailored to personality-disordered individuals.

CHAPTER FIVE: CRIMINAL JUSTICE MANAGEMENT

5.1. Introduction

The reaction of most people to psychopathic offenders, or other offenders deemed dangerous, is the wish to 'lock 'em up and throw away the key'. The image of the psychopath that produces this reaction is reinforced by information communicated to the public by the media. The same applies to 'dangerous offenders', a concocted categorisation. A more accurate picture of the psychopath, however, arises from closer examination. As was previously argued, the same is not so easily done in relation to the 'dangerous offender'.[1] Members of the public often view psychopaths as serial killers, persons who take pleasure in hurting others. In fact, psychopaths are much less passionate than that. Granted, there are in all probabilities some psychopathic serial killers,[2] but for the most part psychopaths are neither passionate killers nor specialists of any kind. Psychopaths are mostly dispassionate jacks-of-all-trades, lacking in neurosis, great passions, and fervour. The lack of emotional background to their behaviour goes to the depth of their character flaw. As argued, such emotional shallowness prevents moral agency. Absent moral agency implies that psychopathic offenders should not be held criminally culpable for their offending behaviour. Indeed, it has been argued that psychopaths, due to their status as mentally disordered offenders, should be dealt with by the mental health system. One may therefore wonder whether there is a need to discuss the criminal justice management option. Alas, under the current legal situation the majority of psychopathic offenders are more likely to be managed by the criminal justice system than they are by the mental health system. This is due, at least in part, to the fact that

[1] See chapter three on risk assessment.

[2] Ian Brady, one of the two Moors Murders, may be viewed a psychopaths, and indeed appears to have been diagnosed as such. B. Chaundy "Ian Brady: A fight to die" (2000) BBC News <http://news.bbc.co.uk/1/hi/uk/672028.stm>

psychopaths are predominantly regarded as responsible agents who are unresponsive to treatment. Mostly, psychopaths are deemed more eligible for punishment than they are for treatment. As has been previously put forth, this view ought to be considered so disadvantageous as to beget reform and, in all hopefulness, research into the treatability of psychopaths will promote such reform. However, until successful treatment techniques are uncovered, and reform ensues, criminal justice management is necessary, if only for the safety of the public.

The thesis presented here maintains that contemporary criminal justice policies are a reaction to the problem of dangerous offenders, rather than a response. The reaction of the government to the problem posed by this small group of offenders who appear to commit a disproportionate amount of crime in the community appears to be a knee-jerk reaction, rather than a balanced evidence-based response.[3] A more appropriate, rational, and effective response would rest on thorough evaluation of the efficacy of proposed approaches, reflecting society's values, rather than its immediate needs. It would consider the root malady rather than the symptom. It would balance essential human rights with the need for public protection and the best way to achieve it. Current criminal justice legislation undertakes the short-term needs of members of the public to feel and be protected from dangerous offenders.[4] It does not, however, derive from an adequately thorough and methodical examination of possible solutions. It does not take into account long-term prevention schemes aimed at averting youth from the path of crime. It fails to respond to assertions that imprisonment is a merely temporary solution, that it is costly, and

[3] See discussion in A. Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection" *Crim LR* 516-532.

[4] See Ashworth's analysis of objective and subjective senses of public protection in Ibid., at 519.

that prisons are already overcrowded.[5] The upsurge of mandatory and extended sentences may respond, at least partly, to the impermanency of imprisonment, but it increases both cost and problems of overcrowding. According to a 2002 comprehensive study, one in two male prisoners, and one in five female prisoners, receive a diagnosis of antisocial personality disorder.[6] According to a government communication publication, there are between 2,100 and 2,400 men in England and Wales who are dangerous and severely personality disordered.[7] In Grendon Underwood, a special prison providing treatment for prisoners with antisocial personality disorders, between 26%[8] and 47% are diagnosed as psychopaths.[9] One would expect the prevalence of psychopathy in non-special prisons to be lower than that of Grendon, but it is unlikely to be lower than 8%.[10] Bearing in mind that the prison population is nearing 70,000,[11] there are no less than 6,000 psychopathic offenders imprisoned in England and Wales. It is reasonable to consider that 15% of prisoners are psychopathic. Thus the number would be closer to 10,000. It would thus appear that regardless of the measure used to classify personality disorder or the prison sample studied, the impact of imprisoning these individuals may indeed be considerable. Furthermore, current criminal justice legislation does not well respond to the problem of new generations of offenders. These new generations will only add to the problems facing the correctional system today. A short-sighted criminal

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[5] See BBC News "Jail Overcrowding Warning" (28 December 2000)
[6] Fazel and Danesh "Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys", at 548.
[7] *The Dangerous and Severe Personality Disorder (DSPD) Programme* (2002)
[8] Using a cut-off score of 30. See Hobson and Shine "Measurement of Psychopathy in a UK Prison Population Referred for Long-Term Psychotherapy"
[9] Using a cut-off score of 25. See *The Feasibility of Conducting an RCT at HMP Grendon* (03/03 2003) at 7.
[10] An admittedly low prevalence rate found in Scottish prisons. See D J. Cooke and C. Michie "Psychopathy Across Cultures: North America and Scotland Compared" 108.1 *J. Abnorm. Psychol.* 58-68, at 64.
[11] Home Office *Prison Population Brief: England and Wales: October 2003* (2003) found 69,700 male prisoners in 2003.

justice reaction to crime resolves a very small fraction of the crime problem.[12]

In 2003, following comprehensive reviews,[13] the government enacted the Criminal Justice Act in an attempt to reform the criminal justice system in England and Wales. Before exploring the provisions of the new Act, it is necessary to outline previous legislation and its drawbacks, which the government sought to solve with the new Act. Thus, the first part of this thesis considers the management of psychopathic offenders under common law and the Powers of Criminal Courts (Sentencing) Act 2000. The four alternatives under the old law, namely the discretionary life sentence, the automatic life sentence, the longer than commensurate sentence, and the extended sentence shall then be canvasses in an attempt to unearth the quandaries it was apparently beset with. The next part addresses the new Act. The examination will attempt to determine whether the 2003 Act has achieved its purpose, namely to fix the problems created by the old law. Subsequently, it shall become clear that the 2003 Act not only failed to solve problems created by the old law, but possibly aggravated those problems. Specifically, the Act does not appear to be capable of increasing public protection. Additionally, the Act continues the government's enduring failure to emphasise both long-term prevention of crime as well as the accurate assessment and identification of offenders at high risk of committed further serious offences. It is here submitted that criminal justice management is not the appropriate management course for psychopathic offenders. However, criminal justice management may be improved with increased emphasis on risk assessment procedures and fitting management based on need assessment.

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[12] See analysis of public protection through imprisonment in Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection", at 519-521.

[13] See *A Review of the Criminal Courts of England and Wales* (2001); Home Office *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001); *Justice for All* (Cm 5563 2002); Criminal Justice Bill 2002.

But first, some background is necessary to understand the context and justification of dangerous offender legislation in general.

5.2. Justification of Dangerous Offender Legislation

Dangerous offender legislation has become quite prevalent in recent years in the Anglo-American, as well as Continental, criminal justice systems, although not as a new phenomenon.[14] These pieces of legislation were meant to restructure the system so as to resolve the problems facing the community posed by violent persistent offenders. Despite the fact that the fear of persistent violent offenders may be overestimated and thus partly illusory, [15] it remains a driving force behind government action. The extent to which society is justified in segregating these offenders beyond what retributivist proportionality warrants is uncertain. The public sees these measures as clearly indispensable, due to the fear the brought about by the perception of danger. It is not, however, as easily defensible from a legal and ethical point of view. Even though the reign of the just-deserts model in England and Wales has been relatively short,[16] its influence is patent.[17] This model views proportionality as fundamental, thereby determining the nature and severity of a sentence by the seriousness of the index offence.[18]

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[14] See J. Kinzig "Preventive Measures for Dangerous Recidivists" 5.1 *Eur J Crime Cr L Cr J* 27-57.

[15] See J. Ditton *et al.,* "From Imitation To Intimidation: A Note on the Curious and Changing Relationship between the Media, Crime and Fear of Crime" 44.4 *Brit J Criminology* 595-610, where it was found that people's perceptions and interpretations drive fear of crime. See also See A. McCreath "Sentencing and the Perception of Risk" 12.3 *J Forensic Psychiat* 495-499, for discussion of the distorted public perception of crime that pressurises governments to adopt tough on crime policies; and Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection" for discussion of the proportion of offences ending in conviction and thus criminal sentencing.

[16] Beginning in the early 1990s with the Criminal Justice Act 1991 and weakened not long afterwards by the Criminal Justice Act 1993.

[17] See Andrew von Hirsch's writings from the 1970s onwards, for example, A. von Hirsch *Doing Justice: The Choice of Punishments* (Hill & Wang 1976).

offence.[18] One's sentence, therefore, must correspond with the gravity of one's offence, rather than one's character, public moral panic or potential criminal behaviour. Indeed, "being antisocial, having a bad character, and being at greater risk for criminal conduct are not punishable crimes."[19] However, since the mid-1990s, sentencing policy has increasingly turned its attention to incapacitation and prevention of recidivism.[20]

A retributivist philosophy known as 'progressive loss of mitigation' justifies, to a degree, longer sentences for repeat offenders. The theory of 'progressive loss of mitigation' maintains that a certain degree of mitigation should be awarded to first offenders. The degree of mitigation would decline with each subsequent conviction. Thus it would permit a sentencing judge to give repeat offenders more severe sentences than those given to first offenders.[21] By and large, patterns of behaviour consist of momentary failures and irregularities, which do not necessarily signify precedent. The criminal justice system ought to take that into account, trusting that the majority of people will learn from their lapse and its associated reprimand and not commit another crime.[22] Repeated failure to abide by the law would result in reduced mitigation, and thus a more severe sentence. Under this model increase in sentencing severity cannot increase indefinitely.[23]

Others have justified dangerous offender legislation on the just distribution of risk between the potential recidivist and the potential

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[18] See Powers of Criminal Courts (Sentencing) Act 2000, sections 79(2)(a) & 80(2)(a).
[19] Morse "Neither Desert Nor Disease", at 290.
[20] For a review of sentencing policies in the last 50 years, see Wasik "Going Around in Circles? Reflections on Fifty Years of Change in Sentencing".
[21] See A. Ashworth *Sentencing and Criminal Justice* (3rd Butterworths 2000), at 165-169.
[22] A. von Hirsch "Desert and Previous Convictions" in A. von Hirsch and A. Ashworth (eds) *Principled Sentencing: Readings on Theory & Policy* (2nd edn Hart Publishing 1998).
[23] A. von Hirsch and J.V. Roberts "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions" *Crim LR* 639-652, at 647.

victim.[24] This entails the balancing of the rights of potential victims, namely the right not to be harmed, with the right of prisoners not to be excessively punished. The scales would tilt in favour of potential victims' rights to safety. However, the likelihood of being victimised by persistent violent or sexual offenders is rather slim,[25] and the probability of those offenders being managed by the criminal justice system and sentenced is even slimmer.[26] Furthermore, the harm to the public perpetrated by repeat offenders is a potential, rather than a definite harm. The harm to the potential recidivist caused by longer incarceration is, however, tangible. Weighing the breach of human rights of recidivists incarcerated beyond their just deserts with the risk of harm to unidentified members of the public may tip the scales in favour of the offender rather than the public.

The main force behind dangerous offender legislation appears to be the public fear of crime. Regardless of the causes of this fear of crime, it is clear that such fear is a problem. Living in fear affects one's quality of life. Some would argue that the issue of quality of life is one to be contended with by the government. Accepting that, however, does not indicate that it is the job of the criminal justice system. Granted, public trust in the criminal justice system is important, but perhaps reacting to fear of crime is not the ideal way. Perhaps education and the dissemination of correct information, rather than empty rhetoric, would help decrease public fear of crime. Reacting to fear of crime with newer and harsher sentencing policies not only fails to increase public sense of safety, but also increases chances of human rights breaches, while failing to adequately manage the crime problem. The following discussion of

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[24] Floud and Young *Dangerousness and Criminal Justice*, cited in Ashworth *Sentencing and Criminal Justice*, at 181.
[25] As the great majority of crimes in the community are property crimes. See *Crime in England and Wales 2003/2004* (10/04 2004) at 18.
[26] See Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection", at 519-521.

past and existing laws demonstrates the inadequacy of such laws in dealing with the psychopathic offender.

5.3. Criminal Justice Management Prior to 2003

Prior to the enactment of the Criminal Justice Act in 2003, sentencing judges had a number of alternatives to choose from when sentencing psychopathic offenders. The first sentencing alternative, being the longest-standing, is the discretionary life sentence, as expounded in *Hodgson*[27] and *Attorney-General's Reference No. 32 of 1996 (Whittaker).*[28] The second sentencing alternative, the longer than commensurate sentence, was introduced by the Criminal Justice Act in 1991. The third sentencing alternative, the automatic life sentence, was introduced by the Crime (Sentences) Act in 1997. The fourth and last alternative, the extended sentence, was introduced in 1998 in the Crime and Disorder Act.

5.3.1. The Discretionary Life Sentence

The discretionary life sentence is derived from well-founded principles expound by the Court of Appeal in the case of *Hodgson*[29] and reiterated in *Attorney-General's Reference No. 32 of 1996 (Whittaker).*[30] First, the court must be satisfied that the offence in question is in itself grave enough to require a very long sentence. Second, the nature of the offence or the history of the offender suggests that the offender is of unstable character and is likely to similarly re-offend in the future. Third, the court is satisfied that the consequences of such re-offending would be especially injurious, as in the case of sexual or violent offences. The courts have interpreted these provisions to restrict the application of the

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[27] *R v Hodgson* (1967) 52 Cr. App. R. 113.
[28] [1997] 1 Cr. App. R.(S.) 261.
[29] *R v Hodgson.*
[30] [1997] 1 Cr. App. R.(S.) 261, at 264-265.

sentence to the most exceptional cases, where there was no other way to manage the risk the offender posed to the public.[31]

Indeed, the seriousness of the offence did not by itself satisfy these requirements.[32] A serious offence giving rise to concern about recidivism was deemed insufficient.[33] The focus was thus on some exceptional and indefinite risk to the public that requires public protection that is otherwise unavailable. The existence of mental disorder, for example, might increase the risk the offender poses enough to attract the discretionary sentence.[34] Psychopathy, therefore, was likely to meet these requirements. Indeed, the current unavailability of confirmed treatment of psychopaths may influence the likelihood that psychopaths will satisfy the requirements of detention under the Mental Health Act 1983.

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[31] See R *v Wilkinson* (1983) 5 Cr. App. R. (S.) 105 (CA), where the defendant was involved in burglaries with no gratuitous violence. It was found that the discretionary life sentence was inappropriate since there was nothing to distinguish the defendant from other bad robbers or burglars. See also *Attorney General's Reference (No.21 of 2002) R. v Anderson* (2002) EWCA Crim where the defendant's sentence was increased to a life sentence on the application of the Attorney General, because the victims of the robberies committed by the defendant were elderly, disabled and vulnerable.

[32] See R *v McPhee* (1998) 1 Cr. App. R. (S.) 201 (CA), where the defendant had a history of alcohol and drug abuse as well as proneness to violence. The Court of Appeal decided against the discretionary life sentence, saying that despite "the seriousness of the offence ..., it could not be said that he was likely to be a danger to the public for an indeterminate time."

[33] R *v Simmonds (2001) 2 Cr. App. R. (S.) 70 (CA)*, Lord Justice Pill: "We are concerned about the risk which the appellant imposes to the public. However, that of itself is not sufficient to justify a life sentence. There are many cases where serious offences are committed and where any sentencing court will be troubled about what happens when the offender is released from prison. Something more has to be established before a life sentence can be justified."

[34] See R *v Wilkinson* and commentary in [1983] Crim. L.R. 488. See also editor's note in R *v Whittaker* (1997) 1 Cr. App. R. (S.) 261 (CA): "when a court is considering whether to impose a discretionary life sentence, the offender's mental state is often highly relevant, but the crucial question is whether on all the facts it appears that the offender is likely to represent a serious danger to the public for an indeterminate time."

5.3.2. The Longer than Commensurate Sentence

Introduced by the Criminal Justice Act in 1991,[35] this penalty was intended to remedy a weakness in the criminal sentencing of dangerous offenders whose offences were not sufficiently serious for the imposition of a life sentence but too serious for commensurate custodial sentences. It allowed a departure from the general rule of proportionality in certain specified cases. Section 2(2)(b) of the 1991 Act[36] facilitates a departure from the proportionality requirement, authorising the imposition of a custodial sentence longer than proportionate to the seriousness of the offence, when deemed necessary for the protection of the public from serious harm. It applies to offences inviting a custodial sentence deemed insufficient due to the need to protect the public.[37]

The section specifies that the longer than commensurate sentence shall be "for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."[38] The court, therefore, has discretion in deciding the length of sentence, emphasising the necessity for the protection of the public from serious harm. Despite this and other indications that the measure is discretionary,[39] the Court of Appeal in the first decision on the measure referred to it as mandatory.[40] Despite such allusion, there remains room for some measure of discretion. Indeed if the court is of the opinion that protection of the public is unnecessary, a longer than commensurate sentence would be uncalled-for.

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[35] Previously in section 2(2)(b) of the Criminal Justice Act, currently in the Powers of Criminal Courts (Sentencing) Act, section 80(2)(b).
[36] Section 80 of the Powers of Criminal Courts (Sentencing) Act.
[37] Ibid., section 80, previously S.2(2)(b) of the Criminal Justice Act.
[38] Powers of Criminal Courts (Sentencing) Act, section 80.
[39] See Sentencing Advisory Panel "The Use of Extended Sentences: Advice to the Court of Appeal" (2001) <http://www.sentencing-guidelines.gov.uk/c_and_a/advice/sentences/sentences.pdf>
[40] See *R v Bowler* (1994) 15 Cr. App. R. (S.) 78 (CA), at 82: "We draw attention to the fact that section 2(2)(b) is mandatory in a sexual or violent offence".

There are three main elements relevant in the application of this sentence. First, the index offence must be one of the qualifying offences identified. Second, public interest must require protection. Third, the seriousness of the potential harm must make such protection necessary. It is thus clear that, albeit limited, a certain amount of discretion remains in the hands of the sentencing court, especially as embodied in the second and third conditions, perhaps too in the first condition. Indeed the statutory definition of a qualifying violent offence may be open to interpretation.[41] By explaining that a 'violent offence' means "an offence which leads, or is intended or likely to lead, to a person's death or to physical injury to a person", the legislators left the specifics to the discretion of judges. The second and third conditions bestow a greater amount of judicial discretion. Assessing the need for public protection from potential serious harm requires that judges analyse and make judgement on multiple risk factors. Hence, despite the designation of this measure as mandatory, a certain range of discretion remains.

The first condition requires that the index conviction be of a qualifying offence, either a sexual or a violent offence, as defined by the Act.[42] The statutory definition of sexual offences leaves little to the imagination by providing an inventory of offences, such as burglary with intent to commit rape, inciting a girl under 16 to have incestuous sexual intercourse, sexual intercourse with mental patients, as well as conspiracy, incitement and attempts to commit such offences. A sexual offence need not be of an exceptionally serious nature to attract this sentence.[43] Conversely, the legislature

[41] See Powers of Criminal Courts (Sentencing) Act, section 161(3).
[42] Sections 161(2) & (3) of the Ibid.. Previously, section 31 of the Criminal Justice Act.
[43] *R v Bowler.* Even a moderate indecent assault, manifested by the touching of women's knickers, in public, and with no attempt to go any further, may be considered dangerous enough to require public protection – see *R v J.T.* (2001) 1 Cr. App. R. (S.) 60 (CA) where the Court of Appeal had to quash a longer than

did not provide a list of violent offences, thereby providing a definition that is more open to interpretation. Violent offences are defined as offences leading, or "intended or likely to lead, to a person's death or to physical injury."[44] Therefore, offences such as threatening to kill may be excluded, since only threats directly aimed at causing death or injury, such as by causing a heart attack to a victim with a weak heart, would cross the threshold. Excluding such offences from the definition of violent offences restricts the adequacy of the protection of the public.

An offender may be psychopathic and pose a high risk of re-offending and still escape a longer sentence if the offence does not qualify. This occurred in *Tucknott*, where a defendant with a violent previous conviction was diagnosed as suffering from a psychopathic disorder could not be sentenced to a longer than commensurate sentence because his index offence was of threats to kill.[45] The Court of Appeal recognised this difficulty and recommended an amendment to the measure to include "an offence which leads to a reasonable apprehension of violence in the victim."[46] This may introduce the right balance between defendant and victim and would strengthen the appearance of public protection.

If an offender is convicted of a qualifying offence, the court must then consider whether it is necessary to protect the public from

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commensurate sentence for indecent assault committed by a 78 year old man because "the formalities necessary to deploy a longer than normal sentence were not complied with." At 209, per Judge Beaumont Q.C.

[44] Sections 161(2) & (3) of the Powers of Criminal Courts (Sentencing) Act. Previously, section 31 of the Criminal Justice Act. Conversely, see *R v Richart* (1995) 16 Cr. App. R. (S.) 977 (CA), where it was said that the offence of threatening to kill could in some circumstances be a 'violent offence', even though in this instance it was not a violent offence.

[45] *R v Tucknott* (2001) 1 Cr. App. R. (S.) 93 (CA).

[46] R *v Richart*, at 980 per Owen J. See also *R v Palin* (1995) 16 Cr. App. R (S.) 888 (CA), per Lord Taylor CJ: "It seems unfortunate that in defining a "violent offence" Parliament should have so narrowed the definition as to exclude offences of this kind, where clearly there is danger to the public and of serious harm to the public on a subsequent occasion." The case concerned robbery with an imitation firearm.

potential harm caused by the future criminal behaviour of the defendant. The legislature guaranteed a high threshold, despite not identifying the evidential requirements, by specifying that public protection must be deemed necessary. Therefore, strong evidence of recidivism may be thought essential in this process. To distinguish between offenders who have the potential to recidivate, offenders who are unlikely to recidivate, offenders who may recidivate but not seriously, and offenders who pose a high risk of recidivating seriously. The longer than commensurate sentence is only justifiable if "the harm predicted by any future criminal behaviour on the offender's part is judged greater than the harm inflicted on the offender through the imposition of an additional period of incapacitation."[47] Therefore, the probability according to which the court decides a criminal is an impending and serious recidivist ought to be high enough to exclude those who are unlikely re-offend seriously.

For the purpose of predicting recidivism, courts ought to rely on psychiatric pre-sentencing reports[48] and the number and nature of the defendant's previous convictions.[49] Indeed, despite the fact that the Act fails to oblige psychiatric reports,[50] such reports are emphasised by statute, legislature,[51] and commentators.[52] Psychiatric reports are particularly weighty when the risk to the public arises

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47 R J. Henham "The Policy and Practice of Protective Sentencing" 3.1 *Criminal Justice* 57-82, at 58.
48 See *R v Robinson* (1997) 2 Cr. App. R. (S.) 35 (CA).
49 Ibid., Otton L J. at 39.
50 See *R v Hashi* (1995) 16 Cr. App. R. (S.) 121 (CA), at 124: "nothing in the relevant provisions of the Act that prevents the judge from reaching his opinion for the purposes of section 2(2)(b) without seeking the evidence of a psychiatrist."
51 See Powers of Criminal Courts (Sentencing) Act, section 81, previously, Criminal Justice Act , section 3, regarding pre-sentence reports and other requirements.
52 See C.M.V. Clarkson "Beyond Just Deserts: Sentencing Violent and Sexual Offenders" 36.3 *Howard J Criminal Justice* 284-292, at 287: "A better approach would be to insist upon *both* previous offending and psychiatric predictions of dangerousness as a prerequisite to the imposition of an enhanced sentence."

from a mental health issue,[53] such as psychopathy. The consideration of mental health issues along with previous conviction[54] may enhance the ability of the law to distinguish between high- and low- risk offenders.

Lastly, the statute specifies that the public must be protected from serious harm caused by the defendant. 'Serious harm' is defined as "death or serious personal injury, whether physical or psychological." [55] The statute did not require serious harm to be of a nature similar to that caused by the index offence. In addition to the self-evident type of serious harm, the courts included such harm as the corruption of youth,[56] and prolonged fear.[57] Not surprisingly, the vulnerability of the victim is relevant to the consideration of the seriousness of harm.

After satisfying the three conditions, courts must decide the length of the sentence extension. The statute did not provide the courts with guidance as to the extension of the sentence, and merely stated that it is a "custodial sentence for a term longer than is commensurate with the seriousness of the offence"[58]. It did, however, provide a maximum, specifically the maximum sentence

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[53] See *R v Fawcett* (1995) 16 Cr. App. R. (S.) 55 (CA), per Garland J. at 58: "if the danger is due to a mental or personality problem, the sentencing court should in our view, always call for a medical report before passing a sentence under section 2(2)(b), in order to exclude a medical disposal".

[54] For consideration of the value of previous convictions in risk assessment, see *Predicting Adult Offender Recidivism: What Works?* They found that the strongest predictor domains were criminogenic needs, criminal history/history of antisocial behaviour, social achievement, age/gender/race and family factors.

[55] Powers of Criminal Courts (Sentencing) Act, section 161(4).

[56] *R v Bacon* (1995) 16 Cr. App. R.(S.) 1031

[57] *R v Webb* (1996) 1 Cr. App. R. (S.) 352 (CA), where the sentencing judge was quoted as saying "In my view your conduct on this particular occasion would be likely to give rise to serious harm, of prolonged fear and reaction to it, but that is not the reason that causes me to conclude there must be a longer sentence to protect the public." He went on to say: "You have a long history of both violent and sexual offences, and on this occasion the two come together."

[58] Section 80(3) of the Powers of Criminal Courts (Sentencing) Act.

available for that particular offence. This maximum seems to favour a measure of proportionality over absolute public protection. [59]

The process of conferring the longer than commensurate sentence is divided into two parts. First, before considering the appropriate period to add for the purpose of public protection, the court establishes a commensurate sentence.[60] The second part, contending with the public protection supplement, requires balancing of "the need to protect the public on the one hand with the need to look at the totality of the sentence and to see that it is not out of all proportion to the nature of the offending."[61]

The longer than commensurate sentence may have increased prison population in 1993,[62] but it did not necessarily protect the public, as intended. The main problem associated with the longer than commensurate sentence relates to the absence of appropriate risk assessment. Judges were given discretion to increase sentences beyond what proportionality required for the benefit of public protection, but were not given the tools with which to assess such risk of harm to the public. The legislation emphasised gravity of harm while disregarding the probability of such harm occurring. The failure to consider whether the nature of the future harm ought to be similar to that caused in the index offence may leave too much to judgement. Judges are thus left to assess phenomena while lacking the expertise. The limitation to violent offences likely to cause death or serious injury itself limits the ability of the courts to protect the public. It therefore appears as though despite the integrity and righteousness of the aim, the application was flawed.

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[59] See Clarkson "Beyond Just Deserts: Sentencing Violent and Sexual Offenders", at 285: "The rationale behind the enhanced sentence is that it is necessary to protect the public – yet the *amount* of the extension appears not to be based on the same rationale."

[60] See *R v Mansell* (1994) 15 Cr. App. R. (S.) 771, 775, per Lord Taylor C J.

[61] Ibid., 775, per Lord Taylor C J. See also *R v Crow & Pennington* (1995) 16 Cr. App. R. (S.) 409, 412 Per Lord Taylor C J.

[62] HORSD *Research Findings* (No. 76 1998). The increase in prison population was by 37%. Conversely, the increase in the numbers of people being sentenced was not the cause of this increase, which was a 6% increase.

Discretion was limited in areas of judicial expertise, and left intact in areas of judicial inexperience. Perhaps a better answer would have been to grant judges the discretion to decide which offences were serious enough to quality, while requiring them to consult forensic mental health professionals on the issue of future conduct.

5.3.3. The Automatic Life Sentence

The automatic life sentence was introduced in 1997 by the Crime (Sentences) Act.[63] It aspired to target recidivist offenders with a tendency to commit serious, violent, or sex offences.[64] The maintained purpose of the sentence was public protection. The rationale behind the measure was that persons convicted of two serious offences present a persistent and significant danger to the public, necessitating incapacitation for an indeterminate period.[65] The danger of recidivism, however, did not necessitate risk assessment. Rather, it was assumed. Essentially, a presumption of dangerousness was generated. However, the statute failed to achieve its purpose for a number of reasons. First, the measure was over inclusive and failed to distinguish the high-risk offender from the low-risk offender. It did so by failing to require that offences be of a similar nature or circumstances.[66] A minimum age at which the offender committed the first qualifying offence,[67] was also deficient. The courts responded to this over-inclusion by relying on their discretion to avoid the sentence when "of the opinion that there are

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[63] Part I, Mandatory and Minimum Custodial Sentences, section 2, now in the Powers of Criminal Courts (Sentencing) Act, section 109.

[64] HMSO *Protecting the Public: The Government's Strategy on Crime in England and Wales* (Cm 3190 1996).

[65] See Lord Bingham, C J. in R *v Buckland* (2000) 2 Cr. App. R. (S.) 217 (CA), at 223.

[66] In R *v Richards* (2002) Crim LR 144 the conviction that compelled the passing of a life sentence was one of manslaughter of a non-violent type (the defendant assistant a willing participant in using heroine by bringing the drug preparing the dose for injection) following a previous conviction of wounding with intent to cause grievous bodily harm. In that case the risk of re-offending was one related to dishonesty offences, rather than violent offences.

[67] See section 109 (1)(b) of the Powers of Criminal Courts (Sentencing) Act; see also discussion in D.A. Thomas "The Crime (Sentences) Act 1997" *Crim LR* 83, at 84.

exceptional circumstances relating to either of the offences or to the offender which justify its not doing so."[68]

Before 2001 the courts interpreted 'exceptional circumstances' rather narrowly.[69] The court gave the word 'exceptional' the lay English meaning of something out of the ordinary, an exception to the norm. The court went further and took the section to require something beyond 'exceptional circumstances',[70] namely a justification for not imposing the life sentence. Such interpretation placed far too great a burden on defendants by requiring them to produce evidence showing both the existence of 'exceptional circumstances' and the absence of serious and continuing danger to the public.[71] The courts only considered the rationale behind the measure after having found that 'exceptional circumstances' existed. The underlying principle was then contemplated in determining whether or not the life sentence was justified.[72]

Fortunately, the court later revised its opinion having recognised that the measure imprisoned low-risk offenders. The court concluded that the rationale of the section is relevant to a finding of 'exceptional circumstances'.[73] Therefore, when considering whether 'exceptional circumstances' existed in a particular case, the court ought to consider the question in the context of the protection of

[68] Section 109(2) of the Powers of Criminal Courts (Sentencing) Act.
[69] See the decision in R *v Kelly* (1999) 2 Cr. App. R. (S.) 176 (CA), at 182, per Lord Bingham C J., where it was said that two conditions must be met: "First, that the court is of the opinion that there are exceptional circumstances relating to either of the relevant offences or to the offender; and secondly, that the court is of the opinion that those exceptional circumstances justify the court in not imposing a life sentence."
[70] Ibid., at 182, per Lord Bingham C J.: "however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section as derived from the Act itself and the White Paper *Protecting the Public* (Cm. 3190) which preceded it."
[71] See the decision in *R v Buckland*, at 223: But if exceptional circumstances are found, and the evidence suggests that an offender does not present a serious and continuing danger to the safety of the public, the court may be justified in imposing a lesser penalty.
[72] R *v Kelly* and R *v Buckland*, as well as critique in R *v Offen* (2001) 2 Cr. App. R. (S.) 10 (CA), at 59.
[73] See *R v Offen*, at 59, per Stephen Peter S.

the public. Therefore, an offender from whom the public did not need protection would not qualify for the automatic sentence due to 'exceptional circumstances'. The 'exceptional circumstances' would be the absence of a risk to the public. This was seen as a welcome conclusion, as the intention was surely not to detain people who presented no unacceptable risk to the public. Therefore a number of factors could suggest to the court that a particular offender does not present the requisite risk to the public, including the nature of the offences,[74] age and the length of the intervening period between offences. The absence of mental disorder was deemed a mitigating factor.[75] The presence of mental disorder, on the other hand, has not been confronted. Arguably, certain mental disorders should be deemed 'exceptional circumstances' that moderate the offender's risk to the public, such as depression. In contrast, disorders such as psychopathy are unlikely to be seen as mitigation as the increase one's risk of recidivism. Since aggravating circumstances are not required in the application of the automatic life sentence, psychopathy is thus irrelevant.

The new test of 'exceptional circumstances' introduced issues related to risk assessment. In construing the test in light of the objective of public protection, the Court essentially required an assessment of risk to be done prior to deciding whether the sentence was appropriate. By taking back some discretion, the Court introduced an issue that it is arguably unqualified to analyse unaided. Assessment of recidivism risk is a complex process requiring a certain amount of knowledge and expertise. Assessment ought to be done by clinicians who are knowledgeable and experienced in the field, rather than judges. Neglecting the wisdom of risk assessment research would inhibit the system from

[74] Ibid., at 60.
[75] See *R v Jackson* (2004) 2 Cr. App. R. (S.) 8 (CA). Contrast with *R v Newman* (2000) 2 Cr. App. R. (S.) 227 (CA); *R v Drew* (2002) Crim LR 220 (CA).

protecting the public from certain offenders who pose a great risk to the public, such as the psychopath.

To recapitulate, the automatic life sentence failed to solve the problems it was geared to. Indeed, some have argued that the sentence failed to provide the intended public protection.[76] It did not increase public protection beyond what was otherwise available,[77] and only forced "judges to pass sentences, which they would in any event have power to pass, which they do not consider appropriate to the particular case."[78] Essentially, the attempt at forcing judges to pass longer sentences became redundant when the courts found ways of avoiding the sentence. The broadening of 'exceptional circumstances' was just such undertaking.

5.3.4. Extended Sentence

The extended licence was introduced by the Crime and Disorder Act 1998.[79] It enabled sentencing courts to lengthen the period of post-release supervision, when sentencing offenders convicted of either a sexual or a violent offence.[80] If the sentencing court is of the opinion that the period otherwise given would not suffice for the rehabilitation needs of the offender and for prevention of recidivism, it could extend the licence to which the offender was

[76] See, for example, Thomas "The Crime (Sentences) Act 1997", at 85.
[77] *R v Robinson* – the automatic life sentence would not have been available due to the absence of a first qualifying offence, despite the fact that his index offence would have qualified as a 'serious offence' That case involved a conviction for possession of an imitation firearm with intent to commit burglary. The defendant did not qualify for a longer than commensurate sentence and received a commensurate sentence of 5 years imprisonment. Note that the defendant had a number of previous conviction that may give rise to a risk of re-offending. In the case of *R v Wilson* (1998) 1 Cr. App. R. (S.) 341 (CA) the defendant made several threats to kill his wife. He was sentenced to 4 years imprisonment as a longer than commensurate sentence. The automatic life sentence would not have been available and thus would not have provided greater protection to the defendant's wife.
[78] Thomas "The Crime (Sentences) Act 1997", at 85.
[79] Section 58, now Powers of Criminal Courts (Sentencing) Act, section 85.
[80] The extension period could only be attached to an offence committed on or after September 30th, 1998.

subject.[81] The background to this measure was the perceived inadequacy of standard periods of post-release supervision in preventing sexual and violent offenders from re-offending.[82] It was anticipated that further supervision would secure the rehabilitation of these offenders so as to reduce their recidivism rates. However, the extended licence had to remain within the maximum penalty that is available for the offence in question. This restricted the promised success of rehabilitation, which is inherently temporally indeterminate.

The extended sentence did not apply evenly to violent and sexual offences, and regarded sexual offences as requiring longer supervision. The legislature specified additional constraints when sentencing violent offences. The sole limitation on the length of the extension period applied to one convicted of a sexual offence was ten years.[83] Regarding the sentencing of an offender convicted of a violent offence, the statute not only limited the length of the extension to a period of five years, but further required that the preceding sentence of incarceration be of at least four years.[84] Thus, violent offenders were subject to the extended licence only when the seriousness of the offence itself attracted a four-year custodial sentence.

The definitions of sexual and violent offences for the purpose of the extended sentence were specified in the Criminal Justice Act 1991.[85] Sexual offences for these purposes included virtually every sexual offence on the books, to the exclusion of prostitution-related

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[81] Powers of Criminal Courts (Sentencing) Act, section 85(1)(b).
[82] See *Extended Sentences for Sexual and Violent Offenders (Sections 58-60) – Guidance* (1161, 1999)
[83] This section repeals Criminal Justice Act, section 44 which gave courts the power to require a sexual offender to remain on licence until the end of sentence, rather than until the three-quarters point.
[84] According to Powers of Criminal Courts (Sentencing) Act, section 85(7), the Secretary of State may change, by Order, the maximum period for a violent offence up to 10 years. See *Extended Sentences for Sexual and Violent Offenders (Sections 58-60) – Guidance.*
[85] Criminal Justice Act, section 31(1).

offences.[86] Violent offences included all offences leading, intended or likely to lead, to death or physical injury, including arson.[87]

The apparent intention of Parliament here was to place an offender under risk of recall for a period of time enabling more realistic rehabilitation and prevention of re-offending. Essentially this measure was to enable more thorough risk assessment by the Parole authorities. It made greater flexibility and indeterminability of sentences possible, and so improved public protection, while increasing the feeling of uncertainty for offenders. The unspecified end of sentence may result in increased anxiety in offenders, which may lead to unease, disruption and a feeling of 'nothing to lose'. Nevertheless, preserving the commensurability factor maintained some semblance of just deserts. Hence, not unlike the other sentencing possibilities for 'dangerous offenders', this measure failed in effectively protecting the public.

5.3.5. What was Wrong with the Old Law?

Among the options available to sentencing judges, the discretionary life sentence and the extended licence may have been the most valuable for effectively utilising well-founded principles of discretion. By granting judges and the parole board the discretion they are most qualified for, these measures enabled the application of these sentences to those cases that required it the most, where other avenues of public protection were unavailable. The automatic life sentence not only failed to improve public protection, but it introduced new problems to a system already disadvantaged. It failed to resolve the prevalent problem of failing to distinguish between the high-risk and low-risk recidivist. Indeed, sentencing judges were so reluctant to apply the automatic sentence, they found ways to expand their discretion in opposition to legislative

[86] Under Sexual Offences Act, sections 30, 31, 33-36.
[87] Criminal Justice Act, section 31(1).

intent. The longer than commensurate sentence likewise added to the problems faced by the system. It increased prison population without increasing public protection. Akin to the other measures, it failed to utilize risk assessment processes, which would have enabled the system to distinguish the high-risk from the low-risk offender. It is therefore not surprising that parliament saw a cause for reform in 2002 and responded to it with the more comprehensive Criminal Justice Act of 2003.

The old framework suffered from all types of problems, largely from both lack of clarity and lack of predictability in its management of persistent offenders.[88] The old provisions failed to prevent the occurrence of re-offending.[89] Indeed more than half of all sentenced prisoners discharged in 1995 were reconvicted of a standard list offence within two years.[90] Arguably, this was due to an excessive emphasis on the index offence, while de-emphasising the criminal history of career criminals.[91] Thus, the problem of repeat offending was inadequately tackled. Lack of cooperation between agencies also meant that the offender's progress throughout their sentence was disregarded, thereby undermining both rehabilitation and monitoring.[92]

Thus, it was felt that a new philosophical emphasis needed to be made. Focusing on methods that reduce recidivism would serve crime reduction purposes as well as reparation and punishment.[93] Truth in sentencing strategies would ensure that offenders serve their full sentence, even when released into the community. Enhanced supervision to run to the expiry of one's sentence would

[88] See *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at para 0.2.
[89] See *Criminal Justice: The Way Ahead* (Cm 5074 2001), at 41, para 2.61.
[90] See HOSB *Reconviction of Offenders Sentenced or Discharged from Prison in 1995, England and Wales* (Issue 19/99 1999), 58% of all sentenced prisoners and 56% of offenders sentenced to community penalties.
[91] See *Criminal Justice: The Way Ahead*, at 41, para 2.62.
[92] See Ibid., at 41, para 2.64.
[93] *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at paras 0.3, 0.4.

improve attempts at reducing recidivism and public trust in the criminal justice system.

5.4. The Criminal Justice Act 2003

5.4.1. Background

In late 2002,[94] the government introduced to the House of Commons the Criminal Justice Bill. The Bill was based on the White Paper *Justice for All*,[95] published earlier in 2002. The White Paper was itself based on proposals made in three documents published in 2001, namely the Auld Review[96] and the Halliday Report[97] and a policy document titled 'Criminal Justice: The Way Ahead'.[98] Both the Auld Review and the policy document presented a thorough evaluation of the criminal justice system, and only dealt with sentencing as part of a more comprehensive reform. The Halliday Report, on the other hand, focused on sentencing.

The Criminal Justice Act itself follows many of the recommendations in both the Auld Review and the Halliday Report, implementing wide-ranging changes to the criminal justice system. Some recommendations, however, were not heeded. For the first time in English law, specific purposes of sentencing are specified.[99] In making sentencing decisions, the court must consider the aims of punishing offenders, reducing crime,[100] reforming and rehabilitating offenders, protecting the public, and making

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[94] 21st of November.
[95] *Justice for All*. Hereafter referred to as the 'White Paper'.
[96] *A Review of the Criminal Courts of England and Wales*. Hereafter referred to as the 'Auld Review'.
[97] *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*. Hereafter referred to as the 'Halliday Report'.
[98] *Criminal Justice: The Way Ahead*. Hereafter referred to as the '2001 policy document'.
[99] Criminal Justice Act 2003, section 142.
[100] Including the reduction of crime through deterrence.

reparation by offenders to those affected by their offences.[101] The Act avoids specifying which of the five purposes should take priority in case of conflict. It also fails to ensure proportionality as an essential principle of sentencing. Failing to require that sentences be proportionate to the seriousness of the offence may produce tension between the Act and ECHR principles. Indeed, both the Council of Europe[102] and Charter of Fundamental Rights of the European Union[103] urge sentencing schemes to include the principle of proportionality. Moreover, the Halliday Report itself reiterates the importance of proportionate sentencing.[104]

The Act further specifies that these purposes need not be considered when sentencing dangerous offenders and when making mental health orders,[105] thereby moving further away from the principle of proportionality.[106] Interestingly, although the UK is not alone in introducing comprehensive reforms of sentencing practices,[107] it is virtually alone in dispensing with proportionality as an important principle of sentencing.[108] The Act's de-emphasis of proportionality does, however, correspond with its aims to reduce crime and protect the public from repeat offending. Such aims,

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[101] Criminal Justice Act, section 142. Under the Criminal Justice Bill, section 126, the reform and rehabilitation of the offender were mentioned as means of reducing crime.

[102] See Council of Europe, *Consistency in Sentencing* (R (92) 18 1993), A.4.

[103] *Charter of Fundamental Rights of the European Union* (2000/C 364/01, Art. 49(3), in force since February 2003.

[104] *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at 12-14, paras 2.6-2.11.

[105] Criminal Justice Act, section 142(2)(c) & (d).

[106] Despite the fact that the Halliday Report maintains the importance of proportionality when dealing with persistent offenders. See *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at 14, para 2.13. For further discussion of the possible breach of the proportionality principle, see Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection", at 528-530; von Hirsch and Roberts "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions".

[107] Canada and New Zealand have introduced reforms in 1996 and 2002, respectively. South Africa, and Australian State of Victoria have recently reviewed their sentencing regimes.

[108] See von Hirsch and Roberts "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions", at 640.

however, inherently lead to inconsistencies in sentencing practices, especially in the absence of clear guidance from legislatures on the hierarchy of such aims.[109]

The Act makes the consideration of each previous conviction obligatory to the assessment of the seriousness of the index offence,[110] to be treated as an aggravating factor. The court must consider previous convictions as aggravating circumstances, if its nature is deemed relevant to the index offence, and with consideration to the time that has elapsed between the convictions.[111] The implications the relevance requirement is unclear. Nature of offence may refer to the gravity or seriousness of the harm caused, or its nature as a sexual, violent or property-related offence. It may also refer to potential harm, societal attitudes, the manner in which the offence was committed, the victim etc. The Act is similarly vague about the duration of elapsing time between convictions and does not place a ceiling on such intervening time period. It is thus left to the discretion of the sentencing judge to decide whether a particular intervening period is excessively long to count as an aggravating factor. The section does not limit the aggravating effect of previous convictions to violent, sexual or serious offences. Such vagueness enables non-violent offences to attract relatively severe sentences, if committed by career criminals.[112] Furthermore, in contrast to the Halliday

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[109] See Ibid., at 641.

[110] Criminal Justice Act, section 143(2): "In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to –
(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
(b) the time that has elapsed since the conviction."

[111] Ibid., section 143(2).

[112] See von Hirsch and Roberts "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions", at 647-649.

Report,[113] the Act appears to impart no restriction on the increase of sentence severity as a result of previous convictions. Thus, not only could petty repeat offenders receive extended sentences due to their criminal career and despite pettiness, such extended sentences could be disproportionately severe.[114]

When dealing with dangerous offenders, the Act requires courts to opine on the risk of harm the offender may pose to the public.[115] Such risk assessment is relevant when sentencing dangerous offenders to a life sentence, a public protection sentence,[116] or an extended sentence for certain violent or sexual offences.[117] When doing so, the court must obtain and consider a pre-sentence report.[118] When sentencing mentally disordered offenders, the court must obtain and consider a medical report in relation to the mental disorder before passing a custodial sentence.[119] Both requirements are not absolute and can be dispensed with if the court deems them to be unnecessary.[120] Unlike the 'exceptional circumstances' condition of the old automatic life sentence, the Act does not specify when courts may find pre-sentence reports unnecessary. Leaving the necessity of pre-sentence reports to the unqualified discretion of the court negates the obligatory part of the condition, producing a preference.

The Act does not repeal existing provisions on mitigating circumstances in relation to mentally disordered offenders,[121] although it is quite clear that psychopathic personality disorder is

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[113] *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at 16, para 2.20.
[114] See von Hirsch and Roberts "Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions", at 649.
[115] Criminal Justice Act, sections 225 (1)(b), 226(1)(b), 227(1)(b)(i), & 228(1)(b)(i).
[116] Ibid., sections 225(1)(b) & 226(1)(b).
[117] Ibid., sections 227(1)(b)(i), & 228(1)(b)(i).
[118] Ibid., section 156(3)(a).
[119] Ibid., section 157. Excluding sentencing fixed by law.
[120] Ibid., sections 156(4) & 157(2), respectively.
[121] Ibid., section 166.

unlikely to act as mitigation of sentence. Psychopathy is a rather unique mental disorder in that its behavioural picture produces antipathy rather than compassion. Evidence of psychopathy tends to have negative implications for the offender in question.[122] Unlike psychopathy, the majority of mental disorders harm the sufferer more than they do society.[123] There are at least three factors that contribute to this negative assessment. First, the psychopath is a callous predator for whom society's rules are inconsequential. Second, studies assessing the risk posed by psychopaths confirm that psychopaths are at a higher risk of general and violent recidivism. Lastly, the absence of conclusive evidence regarding the treatability of psychopaths affords sufficient grounds for therapeutic hesitation. The cumulative weight of these grounds is disheartening. What we see are bad, dangerous people who are beyond hope. With this type of evidence, it is hard to view psychopaths as mentally disordered individuals who need treatment rather than punishment. It is therefore to be expected that psychopathy is seen as an aggravating, rather than a mitigating, factor.

5.4.2. Life Sentence or Imprisonment for Public Protection for Serious Offences[124]

The Act introduces a sentence specifically aimed at public protection. This sentence applies following a conviction of a serious offence committed after the commencement of the section.[125] The section may be put into operation if "the court is of the opinion

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[122] See I. Zinger and A.E. Forth "Psychopathy and Canadian Criminal Proceedings: The Potential for Human Rights Abuses" 40.3 *Can J Criminol* 237-276. See also Hare "Psychopaths and Their Nature: Implications for Mental Health and Criminal Justice System", at 205 where Hare notes "in most jurisdictions, psychopathy is considered to be an aggravating rather than a mitigating factor."

[123] See, for example, D. Pilgrim and A. Rogers "Mental Disorder and Violence: An Empirical Picture in Context" 12.1 *J Ment Health* 7-18.

[124] Criminal Justice Act, section 225.

[125] At the time of writing, commencement time remains unclear.

that there is a significant risk to members of the public of serious harm occasioned by the commission . . . of further specified offences."[126] Thus, the section yields risk assessment questions, as well as definitional issues related to the qualifying offence.

A 'serious offence' is a specified offence that is punishable by life imprisonment or a minimum of ten years imprisonment.[127] A specified offence is either a violent or sexual offence,[128] as specified in the Act[129] Specified violent offences include many offences under the Offences Against the Person Act 1861, as well as offences from the Explosive Substances Act 1883, Firearms Act 1968, Theft Act 1968 and Criminal Damage Act 1971. Resembling the longer than commensurate sentence, threats to kill fail to qualify as specified violent offences,[130] as does maliciously administering poison so as to endanger life or inflict grievous bodily harm,[131] malicious wounding,[132] abandoning children, etc. Specified sexual offences include many offences under the Sexual Offences Act 1956[133], such as rape, intercourse with children under thirteen etc. The list of serious offences is thus rather extensive[134] with the sole limitation of sentence being of a minimum ten years imprisonment.

5.4.3. Mandatory Life[135]

If the serious offence carries a possible sentence of life imprisonment, and the court is satisfied that the offender poses a significant risk of serious harm to the public if further specified, but not necessarily serious, offences are committed, the court may pass

[126] Criminal Justice Act, section 225(1)(b).
[127] Ibid., section 224(2).
[128] Ibid., section 224(1).
[129] Ibid., schedule 15.
[130] Due to the maximum sentence of ten year. See Offences Against the Person Act 1861, section 16.
[131] Ibid., section 23.
[132] Ibid., section 20.
[133] Most of which were repealed by the Sexual Offences Act.
[134] 153 offences listed.
[135] According to Criminal Justice Act, section 225(2).

a sentence of life imprisonment. The life sentence becomes mandatory if the court is of the opinion that "the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life."[136]

At this early stage, the effect of this sentence is yet uncertain. Much depends on its interpretation by the courts. Requiring that the seriousness of the offence justifies a life sentence may make the new definition of serious offence much more stringent that the common law requirement concerning the discretionary life sentence.[137] Under the discretionary life sentence, all that is required is that the seriousness of the offence justifies a severe sentence.[138] Interpreting the new sentence so narrowly would result in infrequent application, thus reducing the amount of protection awarded to the public, rather than increasing it. A narrow interpretation is probably more likely than not, considering the confusion that is likely to result from the comprehensive reform produced by the Criminal Justice Act 2003.[139] Judges are liable to view the new provisions with an attitude less than enthusiastic, thereby discouraging them from utilising it to its fullest.

5.4.4. Sentence for Public Protection[140]

If the court views the offence as insufficiently serious for the mandatory life sentence, but considers that a conventional sentence would provide inadequate protection for the public, it must pass an indeterminate sentence of imprisonment. The more flexible conditions for the public protection sentence along with their

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[136] Ibid., section 225(2)(b).
[137] See D.A. Thomas "The Criminal Justice Act 2003: Custodial Sentences" *Crim LR* 702-711, at 708.
[138] See *R v Chapman* (2000) 1 Cr. App. R. (S.) 377 (CA), per Lord Bingham C J., at 385.
[139] For further discussion, see Wasik "Going Around in Circles? Reflections on Fifty Years of Change in Sentencing".
[140] According to Criminal Justice Act, sections 225(3) & (4).

resemblance to the conditions for the imposition of the discretionary life sentence would suggest that this sentence would be utilised more readily by the courts. This sentence would thus offer greater public protection than the life sentence, but not necessarily greater than the much older discretionary life sentence.

5.4.5. Extended Sentence for Certain Violent and Sexual Offences[141]

The new extended sentence may be imposed following a conviction of a non-serious specified offence committed after the commencement of this section, thus applying to offences not accounted for under the previous two sentences. The court must believe the offender poses a significant risk of causing serious harm to the public if further specified, but not violent, offences are committed. Moreover, the court must consider the sentence of imprisonment otherwise passed not to be adequate for public protection.

The extended sentence encompasses the term of imprisonment appropriate to the offence, and an extension period under which the offender is subject to a licence. The court shall set the length of the licence period to a duration deemed necessary for the purpose of public protection from serious harm occasioned by the commission of further specified, but not necessarily violent, offences. The maximum length of the extended licence period depends on whether the offence is violent or sexual. In the case of a specified violent offence, the maximum length of licence shall be five years, and for a specified sexual offence, the maximum length of licence shall not exceed eight years. The aggregate length of the extended sentence, namely custody and licence, must not exceed the maximum sentence for the particular offence.

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[141] According to Ibid., section 227.

Again, it seems that the requirements are more stringent than those of older provisions, thus making it harder on the courts to pass sentences that adequately protect the public. Under the old extended sentence, the court was required to pass the sentence if it considered the sentence otherwise passed to be inadequate "for the purpose of preventing the commission by him of further offences."[142] The new extended sentence specifies risk of serious harm, which would appear "to be noticeably higher than for the old extended sentence."[143]

5.4.6. Assessment of Dangerousness[144]

When an offender is convicted of a specified offence and the court has to assess whether there is a significant risk of serious harm to the public from further commission of such offences,[145] the court is required to assess the dangerousness of the offender.

If the offender has no previous convictions of a 'relevant offence', the court is required to consider all available information concerning the nature and circumstances of the offence.[146] The court is permitted to take into account information suggesting there is a pattern of behaviour related to the offence, as well as any other information about the offender.

If the offender has previous convictions of 'relevant offences', an assumption of risk is triggered.[147] The assumption of risk may be rebutted if, in light of all relevant information, it seems unreasonable to conclude that there is such a risk. The court ought to take into account available information regarding the nature and

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[142] Powers of Criminal Courts (Sentencing) Act, section 85(1)(b).
[143] See Thomas "The Criminal Justice Act 2003: Custodial Sentences", at 709.
[144] Criminal Justice Act, section 229.
[145] Ibid., sections 225-228.
[146] Ibid., section 229(2).
[147] Ibid., section 229(3).

circumstances of each of the offences, information about behavioural patterns, and other information about the offender.

This measure is reminiscent of the automatic life sentence, although its scope appears wider, especially considering the extensive list of relevant offences.[148]

5.5. Conclusion

Not surprisingly, the effects of the new provisions dealing with dangerous offenders are contingent on judicial interpretation. Only time will tell whether the Act results in "a huge increase in both the number, and length, of custodial sentences,"[149] or not. The provisions discussed here appear to be both wider and narrower than previous sentencing alternatives. The list of qualifying offences is much longer, although the public risk threshold appears to be higher. It is thus doubtful whether the Act improves public protection at all. Indeed even if the Act is interpreted in a way that increases sentencing severity for dangerous offenders, it is uncertain whether that in itself will have public protection benefits. Even if more offenders are incapacitated by these measures, the protection bestowed is merely temporarily. The government has acknowledged that the group of offenders to target[150] are "a highly fluid group"[151] whose members change from year to year. Thus, new persistent offenders in the community will replace those who are incapacitated. The criminal careers of these persistent offenders begin early[152] and begin declining in middle age, suggesting that a growing number of incarcerated offenders are reaching the end of their criminal careers anyway, making their incarceration a loss-

[148] See Thomas "The Criminal Justice Act 2003: Custodial Sentences", at 710-711.
[149] In *Briefing on the Criminal Justice Bill: for Second Reading in the House of Commons* (2002), at 4.
[150] See *Criminal Justice: The Way Ahead*, Analysis and basic conclusion, targeting offenders, paras 1.28-1.39.
[151] Ibid., para 1.31.
[152] Ibid., para 1.30.

making process. Incarcerating these individuals for longer periods seems rather futile, as the new cohort will only be incarcerated after persistent offending, and the old cohort will be incarcerated way beyond their desert. Indeed the preferable management for these offenders is long-term prevention, rather than short-sighted incapacitation.[153]

Furthermore, the government appears to be over compensating for perceived growth in crime rates. Not only has the overall crime rate been declining in recent years, but the same happened to the rates of violent and sexual crime.[154] Combining the fact that violent and sexual crime constitute a small proportion of the crime rate,[155] with data suggesting that only small percentage of criminals are recidivists, a wide-ranging reaction is both unnecessary and an undesirable infringement on freedoms. Furthermore, most offences committed do not end in a conviction.[156] Failing to prevent youth at risk from turning to a life of crime, criminal justice management ought to be better targeted at individuals. Limiting judicial sentencing discretion only hinders the ability of sentencing judges to award an individualised sentence. Judges ought to be allowed to use their discretion to distinguish between the serious persistent offender and the petty habitual offender. Legislative attempts at managing recidivists consistently fail to distinguish between the two groups. There is nothing to suggest that the Criminal Justice Act 2003 and its provisions for dangerous offenders would be any different. In the absence of long-term prevention of crime, sentencing ought to be more evidence-based. Utilising the psychiatric and psychological assessments of risk[157] may facilitate more specific targeting of offenders, such as psychopathic

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153 Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection", at 523-525.
154 See *Crime in England and Wales 2002/2003.*
155 *Crime in England and Wales 2003/2004* at 18.
156 See Ashworth "Criminal Justice Act 2003: Part 2: Criminal Justice Reform – Principles, Human Rights and Public Protection", at 521-522.
157 As delineated in chapter 3 of this thesis.

offenders, who present unique problems for society and the criminal justice system and may enable more accurate use of extensive sentencing provisions. As a consequence sentencing schemes designed to target high-risk offenders would succeed in identifying those offenders to the exclusion of low-risk offenders.

CONCLUSION

"The social and financial costs to society of failing to solve the deadly mystery of the psychopath will be staggering. It is imperative that we continue the search for clues."[1]

Concluding Remarks

The government recently estimated that between 2,100 and 2,400 men in England and Wales are dangerous and severely personality disordered.[2] This estimate seems improbably low, considering suggestions that there are between 8%[3] and 26%[4] of inmates are psychopaths. Since psychopathy is a more specific and distinct category than DSPD, it is reasonable to expect that there would be more dangerous and severely personality disordered individuals than psychopaths. Indeed there are more antisocial personality disordered individuals than there are psychopaths.[5] According to recent estimates, 47% of prison inmates suffer from antisocial personality disorder.[6] Bearing in mind that the male prison population in England and Wales is nearing 70,000,[7] there are almost 33,000 with antisocial personality disorder. Using the modest estimate of 10% psychopaths, there are no less than 7,000 psychopathic offenders imprisoned in England and Wales. A more reasonable estimate of 15% psychopathic would mean that the psychopathic prison population is closer to 10,000. So long as

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[1] Hare *Without Conscience*, at 220.
[2] *The Dangerous and Severe Personality Disorder (DSPD) Programme*
[3] An admittedly low prevalence rate found in Scottish prisons. See Cooke and Michie "Psychopathy Across Cultures: North America and Scotland Compared", at 64.
[4] Using a cut-off score of 30. See Hobson and Shine "Measurement of Psychopathy in a UK Prison Population Referred for Long-Term Psychotherapy"; 47% were psychopaths using a cut-off score of 25. See *The Feasibility of Conducting an RCT at HMP Grendon* at 7.
[5] Hare "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion".
[6] Fazel and Danesh "Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys".
[7] *Prison Population Brief: England and Wales: October 2003* found 69,700 male prisoners in 2003.

psychopaths remain inadequately managed they will continue to manipulate the system and the people around them. It is vital that we aspire to identify psychopaths and provide appropriate management. This thesis examined the disorder of psychopathy and its management in the criminal justice and mental health systems.

The problem posed by psychopaths has received growing attention recently. The literature suggests that countries such as America, Canada and Sweden struggle with the same problems the UK faces. Indeed much of the research and management ideas in relation to psychopathy come from these countries. Canada in particular possesses state of the art expertise in the diagnosis psychopathy and assessment of recidivism. The Hare Psychopathy Checklist was developed in Canada and has recently been referred to in court.[8] Both the British government and the Canadian government have consulted with Dr Robert Hare, the author of the PCL-R. It is paramount that in developing management programmes we commence not with anger and resentment but with "empirically sound principles."[9]

The government has clearly established the need to manage dangerous people with severe personality disorders, and has explored both civil and criminal management avenues with comprehensive reform of the latter and attempt at such of the former. As mentioned in chapters four and five, the government, despite admirable aims, repeatedly fail to heed the psychopath.[10] The first chapter of this thesis demonstrated that psychopathy is not merely a behavioural construct but a valid clinical disorder. Research has shown that psychopathy diagnosed by the PCL-R is both valid and reliable. The PCL-R accurately describes

[8] *Inmate Welfare Committee William Head Institution v Attorney General for Canada* (2003) FC 870 (Federal Court of Canada)
[9] Home Office *et al.*, "Psychopathy Programme" <http://www.dspdprogramme.gov.uk/pages/what_we-re_doing/what_we_do7.php>
[10] With the exception of the Psychopathy Programme, Ibid.

psychopathy and yields similar results when replicated. The successful results of multiple studies on the validity and reliability of the PCL-R are impossible to ignore. Granted, psychopathy is associated with criminality. However, the personality traits distinctive of psychopathy predispose to criminality. The diagnosis of psychopathy, unlike that of antisocial personality disorder or dissocial personality disorder, is not predominantly behavioural. It assesses interpersonal and affective characteristics as well as socially deviant ones beginning in childhood. Psychopathy, unlike antisocial personality disorder or dissocial personality disorder, cannot be diagnosed solely on the basis of antisocial behaviour. It is a more distinct and specific diagnosis that ought to be acknowledged and accepted as a distinctive target for management.

One of the main advantages of identifying individuals suffering from psychopathy is the association with violent and general criminality. Psychopaths are "as much as three or four times more likely to violently re-offend following release from custody than are non-psychopathic offenders or patients."[11] Neither antisocial personality disorder nor dissocial personality disorder possess such predictive validity. Indeed some of the more robust risk assessment tools include the PCL-R as a measure of psychopathy recognising it as a significant risk factor.[12] The psychopath is both more criminally active and less particular in his choice of conduct than the non-psychopath. A criminal jack-of-all-trades, the psychopath tries anything from verbal manipulation, pathological lying, cheating, theft, vandalism, and outright violence. His violence is impulsive but instrumental and his motives appear irrational and imprudent. He begins his criminal career earlier and persists for longer than the non-psychopath. Furthermore, high scores on the PCL-R, 30 and

[11] Hare "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion".

[12] See, for example, the VRAG. Quinsey *et al., Violent Offenders: Appraising and Managing Risk*. See also the HCR-20: Webster *et al., The HCR-20 Scheme: The Assessment of Dangerousness and Risk – Version 1*; Webster *et al., HCR-20: Assessing the Risk of Violence, Version 2* For further discussion, see chapter 3 of this thesis.

above, are significantly correlated with both general and violence recidivism. It is therefore essential that offenders be assessed for psychopathy using the PCL-R. Accurate diagnosis of psychopathy would enable us to differentiate between the disruptive and risky psychopath and the ordinary criminal. It would allow us to separate the psychopath from the non-psychopath thus minimise the harm caused to the non-psychopath.

Separate management of psychopaths can improve effectiveness of the system as a whole. Many concerns arise in relation to the havoc the psychopaths cause others in detention. The example of Ian Brady, the male member the 'moors murders' folie a deux, is illustrative here. Pleading 'not guilty' to the murder charges,[13] Brady both blamed another for the crimes[14] and showed no remorse, either during the 1966 trial or since.[15] Ever since Brady was detained, he has manipulated the system that exercised society's judgement on him. Brady's manipulations of the system,[16] which started in 1975 with his first hunger strike, continue today in his second hunger strike that started on 30th September 1999.[17] His legal manoeuvrings began with his grievances regarding the conditions of his detention,[18] continued with his protests against his force-feeding,[19] and ended for now with the publication of his book.[20] Granted, transferring Brady to a psychopathy unit would not prevent his manipulations, but it may limit the harm he is able to cause those near him. Whether in a mental institution or prison, the people surrounding the psychopath suffer from his constant

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[13] Though later, in 1987, Brady confessed to two murders. See BBC News "Obituary: Myra Hindley" (15 November 2002)
[14] David Smith, the man who called the police.
[15] Unlike Brady, Myra Hindley, his partner in crime, expressed remorse following her imprisonment. "Obituary: Myra Hindley"
[16] Mr Justice Kay said Brady was 'playing the system'. C. Dyer "Force Feeding of Ian Brady Declared Lawful" 320. *BMJ* 731.
[17] BBC News "Brady Collapses After Hunger Strike" (27 December 1999)
[18] See letters written to the media, BBC News "The Brady Letters" (30 October 1999)
[19] Dyer "Force Feeding of Ian Brady Declared Lawful"; *R v Collins Ex p. Brady* (2000) Lloyd's Rep Med 355 (QB).
[20] Brady *The Gates of Janus: Serial Killing and its Analysis*

manipulation. The manipulations of Randle Patrick McMurphy in *One Flew Over the Cuckoo's Nest* are evocative. McMurphy's constant complaints and control over the other patients hurt the staff as well as the patients. Undoubtedly permitting such disruption to continue would be imprudent. Consequently, it is maintained that assessment of psychopathy in offenders and restricted patients is essential for adequate management not only of psychopaths, but other inmates and patients.

These are, however, legitimate criticisms for such submission. Assessment of psychopathy is expensive and time consuming. It may be impracticable to assess every entering patient and offender. It would certainly be expensive to establish separate units for psychopaths, and presumably most professionals would not want to work at such units.[21] Indeed it has been suggested that those who could face the challenge of the destructive behavioural manifestations of these people and improve their condition deserve a Nobel Prize.[22] They certainly pose a challenging problem to policy makers and practitioners, but not impossible. The solution lies between "angry despair" and "mindless optimism"[23] and can only be found with the aid of reason and objectivity. Managing psychopaths is certainly an expensive endeavour, but not managing them, or managing them inappropriately is worse.

Research has suggested that treatment may make psychopaths worse. Treated psychopaths were shown to have a higher risk of recidivism compared to untreated psychopaths.[24] The increased risk was most likely caused by the unsuitability of the treatment. Most treatment programmes attempt to instil conscience or empathy in

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[21] Lewis and Appleby "Personality Disorder: The Patients Psychiatrists Dislike".
[22] G. Adshead "Murmurs of Discontent: Treatment and Treatability of Personality Disorder" 7.6 *Adv Psychiatr Treat* 407-415, at 413.
[23] Ibid. at 413.
[24] Ogloff *et al.*, "Treating Criminal Psychopaths in a Therapeutic Community Program".

the psychopath.[25] Since psychopaths are incapable of such relational emotions and connections, it is not surprising that empirical success has not been found.[26] Indeed, such training would only assist the psychopath in his manipulations. The psychopathic inclination to manipulate others is assisted by others' displaying their weaknesses. Instructing the psychopath on conscience and empathy would teach him how to simulate these responses without feeling them, thus convincing others that he has changed. It would advise him of what psychiatrists seek before deciding to discharge. Inappropriate treatment therefore not only fails to improve the situation, but increases the risk of harm to others and the costs psychopaths cause.

Developments of new treatment programmes aimed at psychopaths are already in place.[27] It is unclear when the finished product would be available for extensive use. In the interim, however, psychopaths must be managed. The public cannot wait for effective treatment programmes and needs to be protected from psychopaths. Given the risk posed by psychopaths, the need for management is urgent. The question is therefore who should bear the burden of managing psychopaths, the criminal justice system or mental health system? The unavailability of treatment may make criminal justice management more appropriate. However, criminal justice management gives rise to questions of responsibility and moral agency, which are absent in the psychopath.

The disorder of psychopathy is gravely misunderstood not only by the public but also by policy makers. Psychopaths are often viewed as competent individuals who offend because they choose not to

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[25] See T.L. Templemen and J.P. Wollersheim "A Cognitive-Behavioural Approach to the Treatment of Psychopathy" 16.2 *Psychother: Theor Res* 132-139.
[26] Early studies have shown limited success, further hindered by methodological deficiencies and no long-term follow-up. See M.D. Craft *Ten Studies Into Psychopathic Personality* (John Wright & Sons 1965); W. McCord and J. McCord *The Psychopath: An Essay on the Criminal Mind* (D. Van Nostrand 1964).
[27] See Wong and Hare *Guidelines for Psychopathy Treatment Program (PTP)* (2005) See also Home Office *et al.*, "Psychopathy Programme".

care about society's rules and norms. Their apparent rationality obscures their emotional deficiencies creating an appearance of sanity. This sanity, however, is merely a mask[28] that does not represent the true personality of the psychopath. To a certain extent, it is our view of sanity and health that produce our misguided view of the psychopath. Our notions of sanity and insanity are almost exclusively represented by cognitive health and illness. Emotional health is superfluous, while the factor that differentiates sanity from insanity is cognition. A person who accurately perceived reality is deemed sane, regardless of affective deficiency. Emotional ill health is seen as a legitimate complaint, but not one that affects sanity. This view of sanity, insanity and the emotions is, however, erroneous. More and more theorists and researchers turn their attention to the emotions and confirm their importance for health and morality.[29]

Despite recent growth in awareness, the disregard for the emotions remains widespread. This oversight shapes our view of psychopathy and our management of the psychopath in a way that damages all those involved. Instead of focusing our energies on understanding the disorder, preventing its development, and finding treatment, we punish. We punish psychopaths for their antisocial behaviour even though they are neither responsible for their conduct nor affected by punishment. The psychopath fails to learn from either punishment or his mistakes. His imprudence prevents him from benefiting from punishment and thus prevents society from benefiting from the expenditure. This mismanagement results from our failure to study the psychopathy dispassionately. The research presented in this dissertation supports a different course of action.

[28] See Cleckley *The Mask of Sanity*.
[29] See, for example, Nussbaum *Upheavals of Thought: The Intelligence of Emotions* and Goleman *Emotional Intelligence: Why It Can Matter More than IQ*.

The plethora of research supports the claim that psychopathy is a valid clinical disorder that severely damages moral agency. What was once thought to be merely a behavioural disorder predisposing one to antisocial conduct has now moved into the realm of the clinical. One is now confident to declare psychopathy as an established clinical disorder, even in the face of dispute from the American Psychiatric Association.[30] Research on the validity of the Hare Psychopathy Checklist as a diagnostic tool has established the authenticity of the disorder. Novel brain research has empirically supported the legitimacy of psychopathy by demonstrating the uniqueness of the brain of a diagnosed psychopath compared to the non-psychopath. This research has also validates notion of psychopathic emotional deficiency.

The emotional deficits of the psychopath negate their moral agency. Their cognition may appear unscathed but their practical reason, by virtue of their shallow affect, is impaired. Their inability to experience emotions such as empathy, guilt, anxiety and fear, emotions vital to moral agency, prevents them from achieving moral agency. This may be a controversial argument, as the law clearly believes, but a dispassionate study of psychopathy supports it. Psychopaths are morally dead and thus we are not justified in punishing them.

So, accepting that psychopaths are mentally disordered individuals who lack moral agency, we are bound to consider criminal justice management inappropriate. Should we therefore choose not to manage the psychopath at all? Should their lack of responsibility set them free? This is clearly a dangerous idea. The risk that psychopaths pose to society demands management. Public protection most likely requires detention. However, mental health detention requires treatability, and successful treatment programs for psychopaths are currently unavailable. The future may hold

[30] Referring to the disinclination to include psychopathy in the DSM.

hope, as a number of trial treatment programs are in progress both in the UK and in Canada.[31] However, psychopaths require immediate management and waiting for therapeutic results is both impractical and objectionable. Criminal justice management remains the only management option currently available. Since punishment is denied, the only justification for detention is utilitarian. The public protection function is a utilitarian concept, especially in the absence of desert. This utilitarian policy would entail detention for the sole reason of public protection.

If public protection is the exclusive reason for restricting the liberty of psychopaths, society ought to detain them in good conditions. When we imprison a moral agent for a crime, we restrict his liberty for conduct that is within his control. When we compulsorily treat a mentally disordered individual, we restrict his liberty to improve his mental health. When we detain an individual merely because we fear him, in the absence of culpable offending behaviour or treatment, we lack both desert and therapeutic justifications. Since we choose to detain the psychopath for something that is not within his control and for reasons not therapeutic, we remove any role he may have in the process. We detain him for our own benefit, not his. We are therefore obliged to make such detention somehow less detrimental to him. The main harm caused by detention is the loss of liberty. Since that is necessary for our feeling of safety, we ought to assuage a different aspect of the detention, such as the conditions themselves. Improving the conditions of detention would include the provision of healthier food and beverage, more comfortable beds, larger rooms, windows, entertainment etc. This suggestion, however, is controversial at least partly due to our emotional attitudes toward the psychopath, namely fear and resentment. The public is unlikely to favour a policy that makes confinement of psychopaths superior to the

[31] See *Guidelines for Psychopathy Treatment Program (PTP)* (See also Home Office *et al.*, "Psychopathy Programme".

living conditions of law-abiding productive citizens. However, rarely is the right thing to do painless.

Mere disapproval does not invalidate the claim made here. The resistance this proposal may meet with does not change the facts of the matter. In the absence of desert and treatability, detention ought to be of minimal detriment. This solution is merely temporary, however, as further research may support therapeutic optimism. In the interim, we ought to invest in research and immediate management. It is important to note that the recommendations made here do not intend to, not can they, rid us of the problem of psychopathy. This is merely the beginning.

Future Research

Certain issues, which were beyond the scope of this thesis, were not discussed. First, the number of psychopaths in any given society remains unknown. Experts make estimates that there are "at least 2 million psychopaths in North America" and as many as 100,000 psychopaths in New York City,[32] but the accuracy of these estimates in unknowable. These estimates are based on the percentage of psychopaths within institutions and the proportion of mental disorders in society. The only definite data available originates from mental health institutions, prisons and jails. Diagnosing psychopathy in the general population is not viable. However, estimated are. If there are 2 million psychopaths in North America, and the population of North America is approximately 328,539,175,[33] then psychopaths compose of 0.6% of the North American population. Bearing in mind that there appear to be fewer psychopaths in British prisons compared to North American

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[32] Hare *Without Conscience*, at 2.

[33] CIA "World Factbook" (2005) <http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html> estimate the US population to be 295,734,134, and Canadian population 32,805,041.

prisons,[34] it would be safe to estimate that there are approximately 300,000 psychopaths in the UK.[35] The percentage of offenders within this group remains unknown. If, as previously estimated, there are 10,000 psychopaths in UK prisons, 97% of psychopaths remain at large. It is therefore clear that the problem of psychopathy is critical.

Managing all those psychopaths is unfeasible. However, improving our understanding of the disorder may enable us to prevent the development of psychopathy. Further research may suggest that a particular gene is responsible for psychopathy. The ethical issues associated with gene therapy and prevention of birth, albeit beyond the scope of this thesis, may arise in the future. More foreseeable is treatment of the brain dysfunctions of the psychopath. Perhaps future research will enable biomedical engineers to perform reparative brain surgery to repair damaged functions.

Research may shed light on the aetiology of the disorder. Large follow-up studies of children with conduct disorders or psychopathic traits may unearth possibilities for successful interventions. The studies discussed in chapter three suggest that the youth version of the PCL-R[36] may help identify children at risk of developing psychopathy. However, these studies are scarce. Further studies and more comprehensive reviews are necessary. Intervention is a long-term plan that ought to receive priority. However, the public and hence the government seem to favour reactive, rather than preventive, policies. Thus, further research analysing the success of cognitive-behavioural treatment programmes is anticipated.

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[34] See, for example, Cooke and Michie "Psychopathy Across Cultures: North America and Scotland Compared".
[35] UK population is 60,441,457. CIA "World Factbook"
[36] PCL:YV. Forth *et al., The Psychopathy Checklist: Youth Version.*

Society has been struggling with the problem of psychopathy for many years. Whether we approach it from the side of criminal law or mental health law, neither triumph nor disaster awaits us.[37] This thesis is concluded with the hope that we strive to disregard the resentment that psychopaths inevitably provoke and improve the management of psychopaths.

[37] See Rudyard Kipling quote "If you can meet with triumph and disaster, and treat those two impostors just the same." in Adshead "Murmurs of Discontent: Treatment and Treatability of Personality Disorder", at 412.

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